

# **BRIBES, GRATUITIES AND THE CONGRESS: THE INSTITUTIONALIZED CORRUPTION OF THE POLITICAL PROCESS, THE IMPOTENCE OF CRIMINAL LAW TO REACH IT, AND A PROPOSAL FOR CHANGE**

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## **INTRODUCTION**

Virtually every member of Congress has been compelled to become a crook. Most of them, we can hope, regret the necessity of having had to accept a life of crime as the price of holding office, but crooks they certainly are. The evidence of the institutionalized corruption of the Congress has now become inescapable.

An excellent example of how even the most seemingly incorruptible officeholders have been corrupted is the case of Congressman Mario Biaggi. Representative Biaggi, a twenty-three year veteran of the New York City Police Department and the recipient of the Medal of Honor for Valor and twenty-seven other police department decorations, including ten for being wounded in the line of duty, retired from his law enforcement career and was elected to the House of Representatives to represent a district in the Bronx.<sup>1</sup> In time, he acquired sufficient seniority to become the Chairman of the Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee.<sup>2</sup>

On April 13, 1984, Representative Biaggi's campaign committee filed its Report of Receipts and Disbursements with the Federal Election Commission for the first quarter of the 1984 election year.<sup>3</sup> It showed total contributions of almost \$45,000. Of the \$31,150 collected in 108 individual contributions, only one individual contribution of \$250 was reported from a donor with a New York address.<sup>4</sup> Donors from Louisiana, Texas, and Mississippi, the location of the headquarters of many shipping and offshore drilling concerns, made up 101 of the 108 individual contributions.<sup>5</sup>

Of \$13,310 in political action committee (PAC) contributions, \$5,000,

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1. 99TH CONGRESS, 1985-1986 OFFICIAL CONGRESSIONAL DIRECTORY, 136-37 (1985) [hereinafter cited as CONGRESSIONAL DIRECTORY].

2. *Id.* at 336.

3. This filing is required by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455 (1982).

4. This contribution was received from an executive of the International Mates & Pilots Union.

5. The report requires the listing of the donor's employer. Although the names of the employers shown on the report filed by Representative Biaggi's committee for the various contributors are often not helpful in identifying what kind of activity the concern is engaged in, a review of those

by far the largest single contribution<sup>6</sup> and almost forty percent of the total PAC contributions for the quarter, was received from the Seafarers Political Action Committee (SPAD), a PAC associated with the Seafarers Union and one of the biggest spending union-affiliated PACs.<sup>7</sup> Six trade or union PACs associated with the shipping or offshore drilling industries contributed an additional \$4,000.<sup>8</sup> Only one contribution of \$60 was received from a PAC with a New York address having no obvious connection with the shipping or drilling industries.<sup>9</sup>

During the 1984 calendar year, Representative Biaggi's campaign committee ultimately received over \$170,000 in total contributions.<sup>10</sup> On October 15, 1984, the Seafarers Political Action Committee contributed yet another \$2,500 to the campaign committee—on its face a felony violation of the FECA both for the Seafarers PAC and the campaign committee if done knowingly and willfully<sup>11</sup> and, in all events, an apparent violation of the Act punishable by substantial civil penalties.<sup>12</sup>

Representative Biaggi, however, had little need of this campaign war chest of roughly twice his annual salary as a congressman since in 1984, as in the two previous elections in 1980 and 1982, he ran for re-election unop-

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that do suggest a trade affiliation indicates that the majority are affiliated with the shipping industry, the offshore drilling industry, or unions associated with such industries.

6. The next largest were four \$1,000 contributions from PACs associated with a shipping company in New Orleans, a shipping company in San Francisco, a drilling company in New Orleans, and the "Better Government Fund of McDermott Political Action Committee," also of New Orleans.
7. On May 19, 1985, the Federal Election Commission (FEC) issued its report on PAC contributions during the 1983-84 election cycle. The Seafarers Political Action Committee (SPAD) is shown as the third largest labor contributor to federal candidates with \$1,322,410 in total contributions.
8. Lykes Brothers Steamship Active Citizenship Campaign, \$1,000; National Ocean Industries Political Action Committee, \$250; International Association of Drilling Contractors Political Action Committee, \$500; American Pilots Association Political Action Committee, \$250; Delta Steamship Lines Political Action Committee, \$1,000; Ocean Drilling and Exploration Political Action Committee, \$1,000.
9. The New York Telephone Federal Political Action Committee.
10. This is the total reflected in the committee's amended report filed March 27, 1985.
11. Under 2 U.S.C. § 437g(d)(1) (1982), a knowing and willful violation of the Act involving "the making, receiving, or reporting of any contribution . . . aggregating \$2,000 or more during a calendar year" can be fined an amount not to exceed the greater of \$25,000 or 300% of the contributions involved, require imprisonment for not more than one year, or both. Under 2 U.S.C. § 441a(a)(2)(A) (1982), a multicandidate political committee, such as the Seafarers PAC, is prohibited from contributing more than \$5,000 to any candidate's campaign committee with respect to any particular election. Under 2 U.S.C. § 441a(f) (1982), Representative Biaggi's campaign committee is prohibited from knowingly accepting a contribution made in violation of the FECA limits.

The October 15, 1984, contribution of an additional \$2,500 to Representative Biaggi's committee exceeded by that amount the \$5,000 maximum contribution already made by the Seafarers PAC on January 10, 1984, and therefore seems to be a violation of the Act by the PAC and, if accepted by the committee with knowledge of the earlier contribution, a violation by Representative Biaggi's committee. Moreover, since 2 U.S.C. § 434(b)(2) (1982) requires the reporting of contributions both "for the reporting period and calendar year," Representative Biaggi's campaign committee seems to have committed an independent violation of the FECA when, on its report filed with the FECA on October 26, 1984, it represented the total contributions received from the Seafarers PAC for the year-to-date to be only \$2,500 rather than the actual total, \$7,500.

12. See 2 U.S.C. § 437g(a)(5) (1982). These penalties can take the form of a conciliation agreement with the Commission providing for a penalty of up to the lesser of \$5,000 or the amount spent in violation of the Act for a "violation" (§ (5)(A)), and the greater of \$10,000 or the 200% of the amount spent in violation of the Act for a "knowing and willful" violation (§ (5)(B)). If the Commission is unable to correct or prevent a violation of the Act, it may bring an action in a district court under 2 U.S.C. § 437g(a)(6) (1982). The district court is empowered to impose the same penalties as may be included in the conciliation agreement.

posed by any major party candidate.<sup>13</sup> His campaign committee nevertheless managed to spend \$120,000 during 1984 for a "net income" of \$51,223.<sup>14</sup> At the end of the year, the committee had \$212,002 in cash on hand<sup>15</sup>—money that may be used legally to defray "any ordinary and necessary expenses incurred" in connection with Representative Biaggi's duties or even converted to his personal use.<sup>16</sup>

On May 2, 1984, Representative Biaggi's subcommittee authorized \$250 million to subsidize United States commercial shipping.<sup>17</sup> Later in the year, the congressman unsuccessfully attempted to secure legislation that would require foreign shipping firms to disclose their cargo rates, a measure considered beneficial to American shipping interests.<sup>18</sup> The congressman's Bronx constituency contains very few voters employed in the shipping or shipbuilding industries.<sup>19</sup>

Representative Biaggi is not unique in his approach to "campaign contributions." On December 1, 1985, the *Washington Post* published a report on the activities of Representative Anthony Coelho, the Chairman of the Democratic Congressional Campaign Committee (DCCC).<sup>20</sup> The article noted that Representative Coelho, the Chairman of the Livestock, Dairy, and Poultry Subcommittee of the House Agriculture Committee,<sup>21</sup> was able to win "House approval of controversial, industry-written provisions of a farm bill that includes a section paying farmers not to produce milk."<sup>22</sup>

Eleven of the top twenty-two cooperative association PAC contributors to federal candidates in the 1983-84 election cycle were associated with the dairy or milk industries,<sup>23</sup> with one, the Committee for Thorough Agricultural Political Education of Associated Milk Producers, Inc., being the eleventh largest contributor to federal candidates of *all* PACs.<sup>24</sup> In that same

13. CONGRESSIONAL DIRECTORY, *supra* note 1, at 435.

14. Amended Report, Committee to Re-Elect Congressman Mario Biaggi, filed with the FEC March 27, 1985, for operations during calendar 1984.

15. *Id.*

16. Under 2 U.S.C. § 439a (1982):

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office, may be contributed to any organization described in section 170(c) of title 26 [a charity], or may be used for any other lawful purpose. . . .

*Id.* It should be noted, however, that House rules may limit the extent to which a congressman may use contributions for personal expenses.

17. *Shipbuilding Subsidies Advanced*, 42 CONG. Q. WEEKLY REP. 1070 (1984).

18. *Transportation Notes: Cargo Bill Rejected*, 42 CONG. Q. WEEKLY REP. 2303 (1984).

19. As of 1982, the latest year for which figures are available, the entire state of New York employed only 2,300 persons in the shipbuilding industry. See U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1982 CENSUS OF MANUFACTURERS, INDUSTRY SERIES, SHIP AND BOAT BUILDING, RAILROAD AND MISCELLANEOUS TRANSPORTATION EQUIPMENT 37C-9 (1985). In 1980, the entire New York SMSA employed only 2,763 persons in the water transportation occupations. See 1 U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, CHARACTERISTICS OF THE POPULATION, SECTION 1, 34-474 (1983).

20. Edsall, *Coelho Mixes Democratic Fund-Raising, Political Matchmaking*, Wash. Post, Dec. 1, 1985, at A17, col. 1.

21. CONGRESSIONAL DIRECTORY, *supra* note 1, at 300.

22. Edsall, *supra* note 20, at A17, col. 5.

23. FEC press release, May 19, 1985, at 23.

24. *Id.* at 8.

cycle, Representative Coelho's campaign committee received almost \$15,000 from dairy PACs.<sup>25</sup> His total contributions for the cycle were \$631,565 (forty-third highest for House candidates) with PAC contributions constituting \$287,348 (twentieth highest for House candidates) of this total.<sup>26</sup>

In his capacity as Chairman of the DCCC, the article described Representative Coelho's attitude toward fund-raising following the 1980 election in which corporate and trade association PACs were reported to have shown a strong bias in favor of Republican candidates. The congressman is quoted as having told corporate PACs, "You people are determined to get rid of the Democratic Party. The records show it. I just want you to know we are going to be in the majority of the House for many, many years and *I don't think it makes good business sense for you to try to destroy us.*"<sup>27</sup> In so many words, Representative Coelho told corporate PACs that he did not "think it makes good business sense" to withhold contributions from Democratic candidates. This kind of innuendo is almost comically familiar to any fan of gangster films—a comparison apparently neither unknown nor unwelcome to Representative Coelho, who is quoted in the article as admitting that "[m]y job is to be the hit man. . . . I'm not going to let reformers scare me into thinking that I can't ask people for money. I'm going to ask."<sup>28</sup>

The attitudes and practices of Representatives Biaggi and Coelho illustrate the consequences of a growing problem. On May 16, 1985, the Federal Election Commission issued its report on the 1983-84 election cycle. It reflected that PACs contributed \$105 million to congressional candidates—twenty-six percent of the total contributions.<sup>29</sup> The report confirmed that PAC contributions are increasing steadily each election cycle both in amounts contributed and in percentage of the total contributions.<sup>30</sup>

What is happening here is precisely what appears to be happening. In

25. The FEC filings reflect the following dairy PAC contributions during the 1983-84 election cycle to Representative Coelho's committee: Committee for Thorough Agricultural Political Education of Associated Milk Producers, \$8,479; Dairymen Inc. Special Agricultural Community Education, \$750; Land O'Lakes Inc. Political Action Committee, \$1,000; Mid-America Dairymen Inc. Agricultural & Dairy Educational Political Trust, \$3,000; Political Action Trust Political Action Committee [associated with the Mountain Dairymen's Ass'n], \$500; Western Dairymen's Association Federal Political Action Committee, \$1,000. In addition to these contributions, the FEC reports reflect a substantial number of individual contributions from persons who appear to be associated with the dairy industry and quite a large number of contributions from other agricultural PACs.

26. FEC press release, May 16, 1985; FEC press release, December 8, 1985.

27. Edsall, *supra* note 20, at A17, col. 5 (emphasis added).

28. *Id.* at A18, col. 5.

29. FEC press release, May 16, 1985.

30. The report provides the following breakdown (in millions of dollars):

Senate							
77-78	% Rcv'd	79-80	% Rcv'd	81-82	% Rcv'd	83-84	% Rcv'd
\$9.7	11%	\$17.3	16.5%	\$22.5	16%	\$29.3	17%
House							
77-78	% Rcv'd	79-80	% Rcv'd	81-82	% Rcv'd	83-84	% Rcv'd
\$24.4	21%	\$37.9	26%	\$61.1	29%	\$75.6	34%
Total							
77-78	% Rcv'd	79-80	% Rcv'd	81-82	% Rcv'd	83-84	% Rcv'd
\$34.1	17%	\$55.2	22%	\$83.6	24%	\$104.9	26%

the case of incumbent candidates seeking reelection, money is being solicited and accepted from PACs and individuals with a particular interest in the legislation that the candidate is or will be considering and voting upon, in exchange for the officeholder being influenced to favor the donor in the performance of his duties. Under existing law, these actions should constitute a federal felony for both the contributor and the elected official.<sup>31</sup> Similarly, PACs and individuals with special interests clearly make contributions because of the legislator's past or expected future acts favoring the donor. This also should be a federal felony.<sup>32</sup>

If present election laws could be properly enforced, the federal prisons would be liberally populated by lobbyists and former members of Congress. With rare exceptions, however, prosecutions are never brought. This is due not to a lack of will on the part of federal prosecutors, but rather to their inability to enforce existing law. This fact, together with a clearly erroneous premise supporting the existing method of policing campaign finance abuses, virtually assures that the casual corruption now commonplace in Washington will continue.

This article initially examines the existing federal criminal statutes that purport to prohibit the payment or receipt of bribes and gratuities by federal officeholders. The inquiry focuses upon the conduct the statutes actually prohibit as they have been applied by the courts and why successful prosecutions cannot normally be brought against members of Congress. The article concludes by outlining a proposed reform of the existing campaign finance law and suggesting procedures that should eliminate or largely reduce the appearance—and all too often the reality—of corruption that presently exists.

## THE INADEQUACY OF EXISTING STATUTES

### Statutory Framework

Bribery of a member of Congress is proscribed in 18 U.S.C. § 201.<sup>33</sup> Both the donor and the donee are prohibited by separate subsections of the statute from a variety of conduct that is informally divided by the courts into two separate categories: bribes, covered by section 201(b) and (c), and gratuities, covered by section 201(f) and (g).<sup>34</sup>

In reviewing the statutory language set out below, two definitions

31. As discussed *infra* notes 33-39 and accompanying text, 18 U.S.C. § 201(b) and (c) proscribe the direct or indirect corrupt offer, solicitation, giving, receiving, or promise to give or receive anything of value to a member of Congress in exchange for the public official's being influenced in the performance of his duties.

32. As discussed *infra* notes 33-36, 40-42 and accompanying text, 18 U.S.C. § 201(f) and (g) proscribe the direct or indirect offer, solicitation, giving, receiving, or promise to give or receive anything of value to a member of Congress for himself for or because of the congressman's official acts.

33. 18 U.S.C. § 201(b) (1982).

34. This should be kept in mind to avoid confusion. Although the statute itself is entitled "Bribery of public officials and witnesses," only two subsections of the statute, § 201(b) and (c), are commonly described by the courts as dealing with "bribery." Two other subsections, § 201(f) and (g), are commonly described by the courts as dealing with a "gratuity." See, e.g., *United States v. Brewster*, 506 F.2d 62, 67-76 (D.C. Cir. 1974). For this reason, the term "bribery" is normally restricted in this article to analysis under subsections (b) and (c) with "gratuities" being used to refer to subsections (f) and (g).

should be noted. As used in section 201, the term "public official" specifically includes members of Congress.<sup>35</sup> The term "official act" is defined to mean "any decision or action on any question [or] matter . . . which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."<sup>36</sup>

### *Bribes*

In relevant part, section 201(b), which applies to the *briber*, provides that a violation is made out when a person "directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . or offers or promises any public official . . . to give anything of value to any other person or entity, with intent . . . to influence any public act. . . ."<sup>37</sup> In relevant part, section 201(c), which applies to the *bribee*, provides that a violation is made out when a public official "directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for . . . being influenced in his performance of any official act. . . ."<sup>38</sup> A violation of either of these subsections is punishable by a fine of not more than \$20,000 or three times the value of the bribe, whichever is greater, imprisonment for not more than fifteen years, or both.<sup>39</sup>

### *Gratuities*

In relevant part, section 201(f), which applies to persons giving gratuities, provides that a violation is made out when a person "otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official. . . ."<sup>40</sup> In relevant part, section 201(g), which applies to the public official receiving the gratuity, provides that a violation is made out when the public official "directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him. . . ."<sup>41</sup> A violation of either of these subsections is punishable by a fine of not more than \$10,000, imprisonment for not more than two years, or both.<sup>42</sup>

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35. Under 18 U.S.C. § 201(a) (1982), "public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of Government, or a juror.

*Id.*

36. *Id.*

37. *Id.* § 201(b).

38. *Id.* § 201(c).

39. *Id.* § 201(b)-(e).

40. *Id.* § 201(f).

41. *Id.* § 201(g).

42. *Id.* § 201(f)-(i).

## Impediments to Prosecution

### *The "Legitimate Campaign Contribution" Exception*

As used in section 201, the term "public official" refers not only to members of Congress but to federal employees generally.<sup>43</sup> When a bribe or gratuity is paid to a public official *other* than a member of Congress, virtually the only precondition to prosecution for at least the gratuity offense under section 201(g) is the discovery of the payment. When this fact has been established, the case essentially proves itself. Since it is not easy to articulate a legitimate reason why, for example, a taxpayer undergoing an audit would wish to give money to the investigating IRS agent, successful prosecutions in this context are almost routine.<sup>44</sup> This follows from the fact that, under the gratuities subsections, section 201(f) and (g), intent need not be proven beyond the intent to make or receive the payment.<sup>45</sup> The gratuities subsections only require "proof that payment was made to an agent in a situation where no payment was necessary."<sup>46</sup>

In the current opinion of the courts, however, the prosecution of a member of Congress presents much more difficulty. In this context, the discovery and proof of the payment is not at issue when it is made as an ostensible campaign contribution. A quick trip to the offices of the FEC will provide the names, addresses, amounts, and dates of payment of any congressman's campaign contributors. Because such payments are made openly and the FECA, by providing limits to contributions, seems implicitly to accept the legitimacy of such payments when made within the prescribed limits, the courts have interpreted section 201 to provide an implicit exception for campaign contributions. Although there are a number of distinct aspects to the exception, the D.C. Circuit's analysis in *United States v. Brewster*<sup>47</sup> is perhaps the clearest explanation of its rationale and, precisely because of this, the clearest illustration of its analytic flaw.

[If] no intent whatever was required under the gratuity section of the statute . . . it is difficult to see how section (f) or (g) can state a criminal offense as applied to an elected public official. Every campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official. If subsection (f), and inferentially subsection (g), contain no element of criminal intent, then these sections cannot be applied to elected public officials, because then there is no distinction in the case of an elected public official between an illegal gratuity and a perfectly legitimate, honest campaign contribution.

. . . .

43. *Id.* § 201(a). See *supra* note 35.

44. See, e.g., *United States v. Head*, 641 F.2d 174 (4th Cir. 1981); *United States v. Standefer*, 610 F.2d 1076 (3d Cir. 1979), *aff'd*, 447 U.S. 10 (1980); *United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978), *cert. denied*, 439 U.S. 980 (1978); *United States v. Harary*, 457 F.2d 471 (2d Cir. 1972); *United States v. Barash*, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969); *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966), *cert. dismissed*, 389 U.S. 80 (1967).

45. "[Section 201(f)] makes it criminal to pay an official a sum which he is not entitled to receive regardless of the intent of either the payor or payee with respect to the payment." *United States v. Umans*, 368 F.2d 725, 728-30 (2d Cir. 1966), *cert. dismissed*, 389 U.S. 80 (1967), *quoted in United States v. Brewster*, 506 F.2d 62, 73 n.26 (D.C. Cir. 1974).

46. *Id.*

47. 506 F.2d 62 (D.C. Cir. 1974).

. . . [W]here an elected public official is concerned, there is a requirement of criminal intent under section (g) as well as under section (c), and . . . the requisite criminal intent under section (g) is found in the words "otherwise than as provided by law for the proper discharge of official duty . . . for or because of any official act performed or to be performed by him . . . ."<sup>48</sup>

The *Brewster* "perfectly legitimate, honest campaign contribution" exception to the prohibition of section 201(g) on receipt of gratuities is not based on the statutory language. Although Congress is certainly free to create an exception in the statute for campaign contributions or, indeed, to exempt its members entirely from the reach of section 201,<sup>49</sup> it has consistently rejected suggestions that it do so.<sup>50</sup> The rationale for a campaign contribution exception to section 201, as suggested by the *Brewster* discussion, instead appears to be a kind of "rule of necessity." Since it is known that members of Congress regularly accept campaign contributions and it is thought that such a practice is required as a practical matter to become or remain an elected federal officeholder, campaign contributions are deemed innocent and thus not capable of restriction by section 201. This kind of analysis has been adopted by both a Supreme Court Justice and contributors to prestigious legal journals. Justice White has noted:

A legislator must maintain a working relationship with his constituents not only to garner votes to maintain his office but to generate financial support for his campaign. He must also keep in mind the potential effects of his conduct upon those from whom he has received financial support in the past and those whose help he expects or hopes to have in the next campaign. An expectation or hope of future assistance can arise because constituents have indicated that support will be forthcoming if the Member of Congress champions their point of view. Financial support may also arrive later from those who approve of a Congressman's conduct and have an expectation it will continue. Thus, mutuality of support between legislator and constituent is inevitable . . . .

All of this, or most of it, may be wholly within the law and consistent with contemporary standards of political ethics.<sup>51</sup>

Academicians support this view:

When members of the executive and judicial branches accept money from private interests and then support these interests, a strong inference of unethical and illegal conduct arises. But because of their unique representative status, the same cannot be said of congressmen. Members of Congress owe a certain degree of loyalty to their constituents; at the same time, they rely upon gifts in the form of campaign contributions to finance their constantly escalating costs of travel expenses and political campaigns. Forced to satisfy their own needs as well as to serve the interests of their constituents, congressmen often incur the favor of special interest groups by proposing and

48. *Id.* at 73 n.26. See also *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

49. See *United States v. Brewster*, 408 U.S. 501, 524 (1972).

50. See, e.g., Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK L. REV. 1019, 1090-91 (1974).

51. *United States v. Brewster*, 408 U.S. at 557-58 (White, J., dissenting). Justice White was joined by Justices Douglas and Brennan in his dissent.



voting for certain legislation; in return for this support, congressmen often receive generous campaign contributions. This may reflect a community of interest, or expectation on both sides, or it may be an outright bribe.<sup>52</sup>

Such arguments are flawed in several respects. At the most simple, linguistic level, the arguments confuse a *constituent*, defined as "one who elects or assists in electing another as his representative,"<sup>53</sup> with a *contributor*. Contributors are by no means always, or even usually for many congressmen, constituents of those to whom contributions are given.<sup>54</sup> Indeed, they may never have seen the congressman's constituency or have the slightest interest in the needs and concerns of the citizens the congressman was elected to represent.

At a more basic level, these arguments are both amoral and, at their core, a repudiation of the concept of democratic government. They accept as not only not improper but, indeed, an expected and perhaps creditable example of democracy in action for elected officials to seek and accept campaign contributions in exchange for being influenced in their legislative conduct. The arguments thus endorse not simply the receipt of gratuities but outright bribes as appropriate conduct by federal officeholders. Such arguments simply ignore the familiar concept of universal and equal suffrage as well as the historic American abhorance for legislative decision-making based on the profit motive.

The ethical confusion inherent in such an obvious contradiction in terms as an exception to section 201 for a "perfectly legitimate, honest campaign contribution" is understandable, however, in light of the universal inability of the courts to distinguish between the clear necessity for campaign contributions and the totally unnecessary knowledge by the congressman of the size of the contributions made by his various contributors. As set forth below,<sup>55</sup> neither a genuine need nor any constitutional protection exists for allowing the congressman to know the size of the contributions made by his contributors. Despite this, legislators make no attempt to isolate themselves from full knowledge with respect to the source and amounts of contributions. It is this needless knowledge that makes the corruption possible and that could, and should, form the basis for criminal liability. Simply put, the "legitimate campaign contribution" exception is wholly unnecessary as there is nothing that currently prevents a congressman from isolating himself from knowledge with respect to his contributors and, in the absence of such knowledge, the requirements of section 201 could never be satisfied. Until this is recognized, however, the courts will continue to adhere to a totally unnecessary deference to the systematic and near universal acceptance of bribes and gratuities inherent in the concept of a "legitimate campaign contribution" exception to section 201. This directly inhibits prosecutions by creating a safe harbor for what would in any other

52. Reinstein & Silverplate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1159-60 (1973).

53. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2d ed. 1983).

54. See, e.g., *supra* notes 3-9 and accompanying text.

55. See *infra* notes 109-119 and accompanying text.

context be blatant violations of the statute. Furthermore, it has had the effect of indirectly chilling the enforcement of the law by so clouding the distinction between legal and illegal conduct that both juries and the courts have had great difficulty applying the law.

### *The Confusing Standards of Illegality*

The Seafarers Union PAC contributed \$7,500 to Representative Biaggi's campaign committee in 1984—half again more than the law appears to permit.<sup>56</sup> In 1984, Representative Biaggi sponsored legislation favorable to shipping interests and thus the unions representing employees in the shipping industry.<sup>57</sup> This \$7,500 might have been a bribe, a gratuity, or as presently viewed by the courts a "legitimate campaign contribution." For the congressman attempting to govern his conduct, or the prosecutor attempting to determine whether a violation of the law has occurred, however, the distinctions now required under section 201 have been very difficult to make.

To understand the reasons for this difficulty, it will be necessary to examine the various elements that must be proved in this context. To do so, we might begin by adopting the approach taken by the court in *United States v. Brewster*<sup>58</sup> and list the elements under the bribery (section 201(c)(1)) and gratuity (section 201(g)) subsections graphically, with some appropriate rearrangement of the statutory language for ease of presentation.

<u>Bribery Subsection</u>	<u>Gratuity Subsection</u>
<i>Distinct Elements</i>	<i>Common Elements</i>
corruptly	Whoever, being a public official . . . directly or indirectly
for himself or for any other person or entity	asks, demands, exacts, solicits, seeks, accepts, or agrees to receive any thing of value
in return for being influenced in his performance of any official act	[is guilty of the offense].
	<i>Distinct Elements</i>
	otherwise than as permitted by law for the proper discharge of official duty
	for himself
	for or because of any official act performed by him

56. See *supra* notes 3-12 and accompanying text.

57. See *id.*

58. *United States v. Brewster*, 506 F.2d 62, 67 (D.C. Cir. 1974).

As reflected by the chart, the initial distinction between the bribery and gratuities subsections of section 201 consists of, first, a difference in what some courts have viewed as the "intent" element. Money received by a congressman is said not to constitute a bribe unless received "corruptly," and not to constitute a gratuity unless received other than as provided by law for the proper discharge of duties. The danger in this kind of analysis, however, is that it tends to give the statutory language a significance it does not possess. In fact, these "intent" elements identified by the courts under both subsections are largely meaningless and have little or nothing to do with intent.

To understand why, in application, a requirement that money be received "corruptly" adds nothing to the bribery subsection, it is necessary to do no more than attempt to visualize a circumstance in which a violation would *not* be made out because of this element alone. Thus, if it can be shown, as it must be under section 201(c)(1), that money is received by the congressman in return for his being influenced in his official conduct, how could it possibly not be received "corruptly?" In this context, the very definition of a corrupt receipt of money can be nothing else than money received in exchange for being influenced.

The requirement under the gratuities subsection that the money be received "otherwise than as provided by law for the proper discharge of official duty" is equally meaningless in terms of establishing any intent element or real *limitation* on criminal liability. Under the most natural interpretation of the statute's language, the only money a congressman receives "as provided by law for the proper discharge of official duty" is his check from the United States Treasury for his salary and other statutorily established expense reimbursements. Congress could hardly have thought it necessary to protect a public official from prosecution for accepting his or her salary. The sole reason for the inclusion of this language in the statute was rather to make clear that public officials may not accept *any* payments "for or because of" their performance of official duties beyond that available under federal law as the salary and expenses to which their jobs entitle them.

The courts, however, have not interpreted the statutory language in this manner when applied to members of Congress. The courts have insulated "legitimate" campaign contributions from prosecution under both the bribery and gratuities subsections when the defendant, as an elected official, receives payments in the form of campaign contributions. The process has provided an excellent example of the application of psychology to the judicial process.

As the offense under the gratuities subsection, section 201(g), involves a lesser punishment than the offense under the bribery subsection, section 201(c), the courts have correctly interpreted the statute to require a more culpable motive for the bribery offense than for the gratuity offense.<sup>59</sup> This is accomplished, however, as in *Brewster*, by giving an independent significance to the term "corruptly" under the bribery subsection. As interpreted by the *Brewster* court:

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59. See *supra* notes 37-42 and accompanying text.

The requisite intent to constitute a bribe is to accept a thing of value "corruptly" under section (c)(1); the comparable intent under the gratuity section (g) is to accept a thing of value "otherwise than as provided by law for the proper discharge of official duty." On the face of the statute the two comparative clauses are not equivalents. Congress did not use the same language in defining criminal intent for the two offenses. "Corruptly" bespeaks a higher degree of criminal knowledge and purpose than does "otherwise than as provided by law for the proper discharge of official duty." It appears entirely possible that a public official could accept a thing of value "otherwise than as provided by law for the proper discharge of official duty," and at the same time not do it "corruptly."<sup>60</sup>

Of course, this kind of analysis misses the point. As set out above, the inclusion of the term "corruptly" adds nothing to the required intent under the bribery subsection and "otherwise than as provided by law for the proper discharge of official duty" does not speak to intent under the gratuities subsection but rather limits, and thus defines by exclusion, the kinds of payments that are forbidden. The intent required under the gratuities subsection is, at most, simply the intent to receive the payments "for or because of any official act."<sup>61</sup> When this is recognized, the *Brewster* analysis breaks down. It is not easy to visualize how it might be "entirely possible that a public official could accept a thing of value" for or because of his official acts "and at the same time not do it 'corruptly.'"

Perhaps recognizing the weakness of its initial effort, the *Brewster* court then expands its analysis to distinguish between the offenses on the basis of the difference between "in return for being influenced" under the bribery subsection and "for or because of any official act" under the gratuities subsection:

[The bribery subsection] appears to us to imply a higher degree of criminal intent [than does the gratuities subsection]. . . . The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.<sup>62</sup>

This analysis does distinguish the receipt of bribes from the receipt of gratuities. The problem analytically is that it is a distinction both unjustified by the statutory language and applicable only where the statute is applied to elected officials and campaign contributions.

There is nothing in the language of section 201(c)(1) that requires a showing of a *quid pro quo* in the sense that the money must be established as the "mover or producer of the official act." On its face, the statute re-

60. *Brewster*, 506 F.2d at 71. *Accord* United States v. Arroyo, 581 F.2d 649, 656-57 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

61. 18 U.S.C. § 201(g) (1982). It should be noted that a requirement that such intent be established gives the congressman a substantial advantage over other officeholders prosecuted under section 201. When the defendant is not an elected federal officeholder, no intent at all need be shown. See *supra* note 45-46 and accompanying text.

62. *Brewster*, 506 F.2d at 72. *Accord* United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980); United States v. Strand, 574 F.2d 993, 995 & n.2 (9th Cir. 1978).

quires only the specific intent to be influenced.<sup>63</sup> It is this element that, under section 201, distinguishes the receipt of the bribe from the receipt of a gratuity.<sup>64</sup> This has been the uniform interpretation of the statute when applied to public officials other than members of Congress. “[The bribery subsection] requires proof of an extra element to convict, a specific intent to influence official action, while [the gratuities subsection] only requires proof that payment was made to an agent in a situation where no payment was necessary.”<sup>65</sup> It is not easy to justify requiring differing elements to establish the offense depending upon what kind of public official is on trial.

Nor does the distinction drawn in *Brewster* survive even *Brewster* itself. Having attempted to distinguish a bribe from a gratuity, the court was then forced to distinguish a gratuity from a “legitimate campaign contribution” and, in doing so, the court found itself forced to require that a gratuity *also* be a quid pro quo for a specific official act. The trial court’s jury instruction under the gratuity subsection requiring that the defendant be found to have knowingly and willfully accepted payments for or because of his official acts was held inadequate for failing to make this clear.

Since “willfully and knowingly” could mean that defendant *Brewster* *knew* when he accepted the money that he was receiving the contribution because of his record of performance in this field of postal legislation, and that if he continued such legislative actions in the future (particularly the near future) he would likely receive further contributions, how does this instruction distinguish the contribution found [to violate the gratuity subsection] here from a perfectly legitimate contribution? No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. *There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official’s action crosses the line between guilt and innocence.*<sup>66</sup>

This analysis finally makes clear the *Brewster* distinction between “legitimate campaign contributions,” illegal gratuities, and illegal bribes. Total yearly contributions of \$7,500 by the Seafarers PAC to Congressman Biaggi that were made for the express purpose, known to the congressman, of rewarding him for past support of shipping interests and to encourage the continuation of this support by the prospect of future contributions are perfectly legal so long as no contribution is attributed to any specific past or future act. The contributions become illegal gratuities if it can be established that such an attribution was made known to the congressman. They become illegal bribes if it can be established that the contributions were the “mover or producer” of the congressman’s future willingness to take such a specified act—if, but for the contribution, the congressman might not have taken such action.<sup>67</sup> Thus, a precondition for any conviction is the ability of

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63. See *supra* note 38 accompanying text.

64. *United States v. Harary*, 457 F.2d 471, 475 (2d Cir. 1972).

65. *United States v. Umans*, 368 F.2d 725, 728 (2d Cir. 1966), *cert. denied*, 389 U.S. 80 (1967).

66. *Brewster*, 506 F.2d at 81 (emphasis added); see also *id.* at 82 (requiring that gratuity conviction be supported by finding that payment was made for “a specifically identified act”).

67. The distinction set out in the text is analytically required if, as held in *Brewster*, the receipt of a gratuity under subsection (g) is a lesser included offense to the receipt of a bribe under subsection

the prosecutor to establish beyond a reasonable doubt that the payments were received "in return for being influenced" with respect to, or were received "for or because of," any *specific* official act, *not* "any official act" as the statute reads. This judicially imposed amendment to the statute, expressly predicated on the perceived need to protect the receipt of "legitimate" campaign contributions from illegality and available *only* to elected federal officials<sup>68</sup> is both unjustified by anything in the statute's language or legislative history and unnecessary to accomplish the intended purpose.

To illustrate the forced nature of the *Brewster* reading of section 201, it is helpful to examine how virtually identical language has been interpreted when incorporated in a state statute. In *United States v. Isaacs*,<sup>69</sup> a former governor of Illinois was found to have accepted stock in exchange for advancing the business interests of the donor in his official duties.<sup>70</sup> The Seventh Circuit's analysis states the traditional view with respect to the need to establish a relationship between the receipt of the payment and any specific act by the public official:

[The Illinois statute] provides that bribery occurs when property is accepted by a public official with knowledge that it is offered with intent to influence the performance of any act related to his public position. No particular act need be contemplated by the offeror or offeree. There is bribery if the offer is made with intent that the offeree act favorably to the offeror when necessary.<sup>71</sup>

The *Brewster* distinction is also entirely unnecessary to protect "legiti-

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(c). See, e.g., *id.* at 68-76. Thus, although the *Brewster* court at no point expressly states that a bribery conviction, in common with a gratuity conviction, must be supported by a showing that the payments were received for a specified act, one of the requirements for finding, as the *Brewster* court did, that receipt of a gratuity under § 201(g) is a lesser included offense to bribery under § 201(c) is that "the elements of the lesser offense must be identical to part of the elements of the greater offense." *Id.* at 71 (quoting *United States v. Whitaker*, 447 F.2d 314, 317 (D.C. Cir. 1971)). Thus, the court's determination that a gratuity conviction under § 201(g) must be supported by a showing that the payment was received for a specific act necessarily means that such an element must also be shown to support a bribery conviction under § 201(c).

68. Cases subsequent to *Brewster* not involving public officials have made clear that the *Brewster* requirement of a showing of a specific act for which payment is received is not applicable to unelected public officials. See, e.g., *United States v. Campbell*, 684 F.2d 141, 149-50 (D.C. Cir. 1982) (trial court did not err in not requiring the jury to find that the gratuity was conferred with specific knowledge of a definite official action for which compensation was intended); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979), *aff'd*, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 481 (5th Cir.) ("[The defendant] is also incorrect in asserting that the government was required to prove that the unlawful compensation was earmarked for a particular matter then pending before [the defendant] and over which he had authority. Neither the ability to perform nor the actual performance of some identifiable official act as *quid pro quo* is necessary for a violation of [inter alia, the gratuity subsection, § 201(g)]."), *cert. denied sub nom.*, *Tate v. United States*, 439 U.S. 870 (1978); *United States v. Niederberger*, 580 F.2d 63, 68 (3d Cir.) ("Thus, we find it unnecessary for the Government to allege in an indictment charging a § 201(g) offense that a gratuity received by a public official was, in any way, generated by some specific, identifiable act performed or to be performed by the official. A *quid pro quo* is simply foreign to the elements of a subsection (g) offense."), *cert. denied*, 439 U.S. 980 (1978); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.) ("Clearly the intent necessary to establish a violation of this section [the gratuity subsection, § 201(f)] may be present whether or not there was an agreement between [the donor and the defendant prison official] regarding particular acts [the defendant] had performed or would perform."), *cert. denied*, 426 U.S. 948 (1976).

69. 493 F.2d 1124 (7th Cir.), *cert. denied sub nom.*, *Kerner v. United States*, 417 U.S. 976 (1974).

70. *Id.* at 1132-40, 1144-45.

71. *Id.* at 1145. See also *United States v. McManigal*, 708 F.2d 276, 282 (7th Cir.), *vacated* 104 S. Ct. 419 (1983).

mate" campaign contributions from illegality. Under section 201(g), a payment cannot be the basis for conviction unless it is received "otherwise than as provided by law for the proper discharge of official duty." As previously set forth, the most natural reading of this language is that it serves simply to make clear that it is illegal to accept any payments for official acts other than an official's salary and expense reimbursements from the United States Treasury.<sup>72</sup> It is at least arguable, however, that the language may be interpreted to exclude campaign contributions since the FECA expressly contemplates the receipt by congressmen of campaign contributions,<sup>73</sup> and, presumably, contributors make such contributions because of the congressman's proper discharge of his duties. One might therefore argue that a campaign contribution is contemplated by law, and thus "provided by law," and made "for the proper discharge of official duty." Although somewhat strained, such an argument would be no less so than the *Brewster* analysis.

Beyond this, "legitimate" campaign contributions are already effectively excluded from the reach of section 201(g) by the requirement in that subsection, in contrast to the bribery offense under section 201(c)(1), that the payment be received by the public official "for himself."<sup>74</sup> "Legitimate" campaign contributions are received by the congressman's committee or, if received by the congressman directly, are received by him only as the agent for the committee to which he must turn over the contribution within ten days.<sup>75</sup> So long as a congressman obeys the law and does not thereafter treat his campaign treasury as the alter ego of his personal bank account, he need not fear a conviction under section 201(g).<sup>76</sup>

*Brewster* has proven to be a costly decision. Seldom has a single case at the circuit court level generated so much mischief in terms of potentially frustrating what should be routine convictions for corruption.<sup>77</sup> All of this

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72. See *supra* p. 133.

73. Under 2 U.S.C. § 432(e)(2) (1982), where the candidate personally is given a contribution, he is considered to have received it as the agent of his campaign committee. Under 2 U.S.C. § 432(b)(1) (1982), he is then required to forward the contribution to the treasurer of the committee within 10 days.

74. See 18 U.S.C. § 201(g) (1982).

75. See *supra* note 73.

76. See *Brewster*, 506 F.2d at 81.

77. The language of *Brewster* creates any number of appealing, and wholly unjustified, arguments for jury instructions that would, if actually followed by the jury, make even the careless and blatantly corrupt public official essentially immune from successful prosecution. In *United States v. Strand*, 574 F.2d 993 (9th Cir. 1978), for example, the defendant U.S. Customs Service employee was alleged to have accepted money in return for his agreement not to inspect the donor's automobile as it crossed the border. *Id.* at 994-95. Relying on *Brewster*, the Ninth Circuit interpreted the term "corruptly" under § 201(c) to incorporate the concept that the payment must be the "prime mover or producer of the official act." *Id.* at 995 (quoting *Brewster*, 506 F.2d 62, 82 (1974)). It also distinguished the receipt of bribes from gratuities by pointing out that the latter offense covers instances where the public official would carry out the act or omission for which he allegedly received payment whether or not the payment was made. *Id.* at 995 & n.2. See also *United States v. Campbell*, 684 F.2d 141, 148 (D.C. Cir. 1982). This provides an excellent basis for defendants to argue that the trial court must charge the jury that the prosecution must establish under the bribery subsection that, but for the payment, the act for which the payment was alleged to have been made would not have been committed. In the context of the *Strand* facts, this would mean that the prosecutor would have to prove beyond a reasonable doubt that, but for the payment, the defendant would have selected the donor's car to inspect. In light of the minimal percentage of automobiles crossing the border that are selected for inspection, such a requirement obviously could not be satisfied; a directed verdict of acquittal would have been required.

The defendant in *Strand* does not appear to have requested an instruction of the type described

is a legitimate part of the price paid for the effort in *Brewster* to create a "legitimate campaign contribution" exception to section 201.

The effect of the *Brewster* analysis is the addition of an additional, and wholly unneeded, element to section 201. The *Brewster* requirement of attribution to a specific act, together with the "for himself" requirement of section 201(g), means that, for all but the most careless, the prosecution of congressmen under section 201 is essentially precluded. Under *Brewster*, so long as the donor does not attribute a payment to any specific act, and no prior agreement is provable that the payment is to be the quid pro quo for the congressman's act, a lobbyist for an industry could visit the chairman of the congressional committee having jurisdiction over the industry every day and deliver cash payments for the congressman's personal use. Moreover, under the "for himself" language of section 201(g), if the payments are properly forwarded to the congressman's campaign committee and, again, there is no prior agreement provable that the payment is to be a quid pro quo, the lobbyist can even deliver the payments with attribution to specific votes. A prosecutor might be able to establish—indeed, a congressman might even admit—that he was handed \$5,000 by the Seafarers PAC and told, "good work on helping kill the bill to end shipping subsidies; here's a little 'campaign contribution' to show our appreciation for your vote." So long as the \$5,000 is forwarded to the congressman's campaign committee, no violation of section 201 would have occurred.

### *The Speech or Debate Clause*

The barriers to the successful prosecution of the corrupt congressman presented by the creation of a "legitimate campaign contribution" exception, and the additional and confusing elements of the offenses under section 201 this has produced, are greatly strengthened by the effect of the speech or debate clause of the Constitution. The clause provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place."<sup>78</sup> Although the clause provides no general immunity from criminal prosecution for congressmen, it does immunize their legislative activity from civil or criminal charges.<sup>79</sup>

The historical development of the speech or debate clause, going back to the resistance of Parliament to the Stuart monarchs, is both colorful and instructive.<sup>80</sup> For our purposes, however, the implications of the clause

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above. What he did receive in terms of instructions, however, may well have been almost as helpful. The trial court charged the jury that the bribery offense under § 201 required proof of specific intent, which it defined as proof "that the defendant knowingly did an act which the law forbids, purposely intending to violate the law." *Id.* at 996. A jury might well not view this as a redundancy. If a prosecutor is required to establish that a defendant purposely intended to violate the law, then to the extent that the jury follows its instructions prosecutions would seem to have little chance of success for all but those who confess to the required intent to violate the statute.

78. U.S. CONST. art. I, § 6, cl. 1.

79. *Gravel v. United States*, 408 U.S. 606, 626 (1972).

80. The historical background of the clause and the impact of this upon its present scope has been discussed by the Supreme Court with some frequency. *See, e.g., Hutchinson v. Proxmire*, 443 U.S. 111, 123-29 (1979); *United States v. Brewster*, 408 U.S. 501, 507-25 (1972); *United States v. Johnson*, 383 U.S. 169, 177-83 (1966); *Kilbourn v. Thompson*, 103 U.S. 168, 201-04 (1880). It has also been addressed in some detail by commentators. *See, e.g., Reinstein & Silverglate, supra* note 52, at



upon the prosecution of a congressman under section 201 is set out in three Supreme Court decisions: *United States v. Johnson*,<sup>81</sup> *United States v. Brewster*,<sup>82</sup> and *United States v. Helstoski*.<sup>83</sup>

In *Johnson*, a former congressman was convicted of violating the federal conflict of interest statute<sup>84</sup> and of conspiracy to defraud the United States<sup>85</sup> because he agreed to make a speech to the House and intercede with the Department of Justice on behalf of a savings and loan association in return for "substantial sums" in the form of campaign contributions and legal fees.<sup>86</sup> The Supreme Court held that the speech or debate clause did not protect the congressman from prosecution for attempting to influence the Department of Justice.<sup>87</sup> The Court held that the clause did prohibit prosecution based on the speech to the House, however.<sup>88</sup> The Court concluded that the speech or debate clause forecloses any inquiry into the *motivation* for any legislative act.

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 for 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.<sup>89</sup>

Prior to *Johnson*, the speech or debate clause had not been invoked to bar prosecutions for bribery.<sup>90</sup> After *Johnson*, it was widely believed that the clause would bar such prosecutions since the essence of a bribery allegation in this context is that the congressman's legislative actions were improperly motivated by the bribe.<sup>91</sup> The *Johnson* Court did, however, leave open the question of whether Congress might effectively waive the speech or debate clause protection against bribery prosecutions that require an inquiry into legislative acts or the motives for such acts by means of a "narrowly drawn statute passed by Congress in the exercise of its legislative

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1122-44; Cella, *The Doctrine of Legislative Privilege of Freedom of Speech or Debate: Its Past, Present, and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK L. REV. 1, 3-30 (1968).

81. 383 U.S. 169 (1966).

82. 408 U.S. 501 (1972).

83. 442 U.S. 477 (1979).

84. 18 U.S.C. § 281 (1982), *repealed by* Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1126 (1962).

85. 18 U.S.C. § 371 (1982):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

86. *Johnson*, 383 U.S. at 170-72.

87. *Id.* at 172.

88. *Id.* at 176-77.

89. *Id.* at 180.

90. Comment, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335, 344 (1965).

91. See, e.g., Cella, *supra* note 80, at 2; Comment, *A Statutory Proposal for Case-by-Case Congressional Waiver of the Speech or Debate Privilege in Bribery Cases*, 3 CARDOZO L. REV. 465, 480-81 (1982).

power to regulate the conduct of its members.”<sup>92</sup> Since Johnson had not been prosecuted under section 201, this suggested that the Court might later address whether Congress could effectively waive speech or debate clause protection of its members, and whether section 201 satisfied the *Johnson* criteria for such a waiver. This was the issue presented in *Brewster*.

The defendant in *Brewster*, a former United States Senator, had been indicted under section 201 for having allegedly accepted a number of ostensible campaign contributions from a mail order concern in return for his legislative actions with respect to resisting a proposed postal rate increase.<sup>93</sup> The district court had dismissed the indictment based on its view that *Johnson* had held that the speech or debate clause precluded any prosecution for bribery to perform a legislative act.<sup>94</sup> The government then took a direct appeal to the Supreme Court.<sup>95</sup>

Before the Supreme Court, the government initially argued only that the Court should determine that Congress could waive the speech or debate clause protection against bribery prosecution and that section 201 fell within the criteria suggested in *Johnson* for a narrowly drawn statute to accomplish this.<sup>96</sup> The Court, however, again found it unnecessary to reach this question as it viewed prosecutions under section 201 not to be directed to legislative motives.

Taking a bribe is obviously no part of the legislative process or function; it is not a legislative act. . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe “does not draw in question the legislative acts of the defending member of Congress or his motives for performing them.”<sup>97</sup>

Although *Brewster* thus allows the prosecution of congressmen under section 201, it limits the evidence that can be offered to establish the violation by forbidding “any showing of how [the defendant] acted, voted, or decided” with respect to any legislative matter.<sup>98</sup> In light of this limitation, it is not easy to understand why the decision produced such dire warnings of its potential to infringe on legislative freedom.<sup>99</sup> As a practical matter, it

92. *Johnson*, 383 U.S. at 185.

93. *Brewster*, 408 U.S. 502-03.

94. *Id.* at 503-04. See also *id.* at 506 (“Since § 201 applies only to bribery for performance of official acts, the District Court's ruling is that, as applied to Members of Congress, § 201 is constitutionally invalid.”).

95. *Id.* at 504. At that time, 18 U.S.C. § 3731 permitted a direct appeal under the circumstances. *Id.* at 504 n.4.

96. *Id.* at 529-32 (Brennan, J., dissenting).

97. *Id.* at 526 (quoting *Johnson*, 383 U.S. at 185). The Court similarly held that it was unnecessary to inquire into the act or its motivation under the gratuities subsection 201(g). 408 U.S. at 527.

98. 408 U.S. at 527.

99. See, e.g., *id.* at 532-40 (Brennan, J., dissenting) (“[the Court] repudiates principles of legislative freedom developed over the past century . . .” (*id.* at 532)); *id.* at 551-63 (White, J., dissenting) (the ability to threaten the legislature with criminal action creates “enormous potential for executive control of legislative behavior” (*id.* at 558)); Cella, *supra* note 50, at 1044-45 (an inquiry into the possibility of improper influence in the performance of a legislative act must, by its very nature, be an inquiry into legislative motives, which in turn threatens legislative independence); Ervin, *The*

is extremely difficult to successfully prosecute a section 201 action if reference to the defendant's legislative acts is forbidden. *Helstoski* graphically illustrates this difficulty.

The defendant in *Helstoski* was a former congressman indicted under section 201 for receiving money from aliens for introducing private bills to prevent their deportation.<sup>100</sup> The prosecution attempted to support its case by introducing circumstantial evidence of the corruption: a regular pattern of the defendant's receipt of money from the aliens and his subsequent introduction of the private bills.<sup>101</sup> The district court held that, while the indictment did not violate the speech or debate clause, the government would not be permitted at trial to introduce evidence of the performance of past legislative acts by the defendant.<sup>102</sup> The government appealed, contending that it should be allowed to offer evidence that refers to legislative acts if such evidence consists of discussions and correspondence that did not occur during the legislative process itself and is offered not to establish the defendant's motive for introducing the private bills, but rather his motive in accepting the payments.<sup>103</sup>

The Supreme Court upheld the district court's evidentiary ruling and, in doing so, again distinguished evidentiary references to *past* legislative acts from references to *future* or *contemplated* acts.<sup>104</sup> As to the former, the Court held that the speech or debate clause prohibited any reference, however general, to past legislative acts.<sup>105</sup> The Court viewed reference to a promise to take future legislative acts, however, as beyond the scope of the clause.<sup>106</sup>

The problem created by the speech or debate clause, as interpreted by the Court at present, is that the most natural method of establishing a violation of section 201(g) is unavailable. By definition, all legislative acts of the defendant at the time of trial are past legislative acts. If these cannot be shown, a pattern of payments made by special interests may be introduced, but the accompanying conversations or correspondence that would link the payments to the congressman's past support of the concerns of the special interest would be inadmissible. Thus, a significant part of the narrow area left available for prosecution under the "legitimate campaign contribution" exception is lost. After *Helstoski*, even those few payments that could survive the exception's scope by being accepted as personal gifts rather than

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*Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 175 (1973) (stating that *Brewster* poses "a clear and present threat to the continued independence of Congress" because members of Congress "can no longer independently acquire information on the activity of the executive branch nor report such information to their constituents without risking criminal prosecution").

100. *Helstoski*, 442 U.S. at 479-84.

101. Representative Helstoski provided the grand jury with copies of 169 such bills that he had introduced on behalf of various parties. *Id.* at 481.

102. *Id.* at 484-85.

103. *Id.* at 486.

104. *Id.* at 490.

105. "As to what restrictions the Clause places on the admission of evidence, our concern is not with the 'specificity' of the reference. Instead, our concern is whether there is mention of a legislative act." *Id.*

106. *Id.* ("it is clear from language of the Clause that protection extends only to an act that has already been performed").

campaign contributions and by being accompanied by a reference to a specific legislative act that the payment is being made to reward will not be subject to prosecution if the legislative act is one that has already been performed.<sup>107</sup> As the Court in *Helstoski* noted in no small understatement, "without doubt the exclusion of such evidence will make prosecutions more difficult."<sup>108</sup>

### A PROPOSED SOLUTION

The campaign contribution exception under section 201 and the limitations imposed on section 201 prosecutions by the speech or debate clause have combined to limit the prosecution of congressmen for bribery under the statute to those instances in which an express agreement can be established that the congressman will take a specified future legislative action in return for payment.<sup>109</sup> Gratuity prosecutions are limited to situations in which a payment is made to the congressman accompanied by attribution to a specific *future* legislative act and the congressman keeps the money for his personal use. But this describes the conduct of none but the most clumsy or desperate. As a result, few prosecutions are possible. Simply put, votes are being bought and sold daily on Capitol Hill and the existing criminal law is essentially impotent to punish or deter it. Moreover, this practice is now so commonplace that it is defended by a Supreme Court Justice and academicians as inevitable and, perhaps, laudable.

The cause of the problem, of course, is the current system of campaign finance. Contributions to a congressman's campaign committee may well be as valuable to him as personal gifts. Indeed, under the FECA such contributions, if not needed to protect the congressman's job, are ultimately available to defray whatever might fall within "ordinary and necessary expenses incurred in connection with his duties" or even to enhance his personal bank account if he was in office to vote such an emolument for himself in 1980.<sup>110</sup> So long as this is the case, and "legitimate campaign contributions" constitute a shield against prosecution under section 201, even the most honest member of Congress is practically required to participate in the corruption just to compete effectively with challengers who have no similar

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107. See Comment, *supra* note 91, at 489. See also Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 YALE L.J. 1280, 1281, 1294 (1979) (contending that the speech or debate clause effectively frustrates the enforcement of the statute).

108. *Helstoski*, 442 U.S. at 488. See also *United States v. Gillock*, 445 U.S. 360, 374 (1980) (in rejecting contention that speech or debate clause protection should be made applicable to state legislators through Rule 501 of the Federal Rules of Evidence, Court notes that the effect of the clause is to "handicap proof of relevant facts").

109. This may even be more optimistic than the existing law suggests. Under the D.C. Circuit's *Brewster* requirement that a bribe be shown to have been the "producer or mover" of the official act in the sense that, but for the bribe, the act might not have been taken by the congressman, it is very difficult to visualize how this element could be established without at least proof that the act was performed. If, under the Supreme Court's decision in *Brewster*, no reference can be made to the legislative act, all that could be shown to the jury would be the *agreement* to take the act in exchange for the payment. How could a jury possibly conclude on such evidence that the promised legislative act, which they are not allowed to know ever occurred, was one that, but for the bribe, might not have occurred?

110. See 2 U.S.C. § 439a (1982). Again, however, it should be noted that House rules may limit the congressman's ability to divert unneeded contributions to his personal use.

scruples. It is simply a political fact of life. If a congressman will not accept the PAC and other special interest contributions and support their agendas in return, they will find someone else who will, and this person might well be the congressman's next opponent.

As originally enacted, the FECA was based on the rationale that full disclosure of a candidate's contributors would allow the voters to detect the existence of the political quid pro quo and punish, by refusing to reelect, those who are shown to be the recipients of the campaign contributions of the special interests whose agenda is supported.<sup>111</sup> As this proved ineffective, the 1974 amendments imposed limits on the maximum that an individual or PAC could contribute to a candidate.<sup>112</sup> Further amendments were made in 1976<sup>113</sup> and 1979,<sup>114</sup> which made some changes in the reporting requirements and contribution and expenditure limitations but left the essential premise underlying the Act unchanged.

This attempt at a solution to the problem was well-intended but has proven ineffective. Indeed, the present law may well have simply institutionalized the quid pro quo as the normal and, at least by implication, the accepted manner by which legislation is enacted. It is simply too much to expect that voters will use the evidence of the reciprocal arrangements between their congressman and special interests as a reason to reject him at the polls if competitive pressures seem to compel virtually all congressmen to participate in such a system.

One alternative solution to the problem, the public financing of congressional elections, was actually accepted by the Senate in 1974 but was ultimately rejected in the House.<sup>115</sup> Of course, if such a substitute ever were to be adopted, it would largely eliminate the current problem. This could be accomplished, however, only at the cost of requiring all taxpayers to contribute involuntarily to the campaigns of candidates or parties with which they may fundamentally disagree. Moreover, there may be a substantial constitutional objection to the public financing of elections.<sup>116</sup> There exists a better and less expensive solution.

The real solution to a current system of campaign finance that virtually

111. As set out in the Senate report in the legislative history associated with the initial, 1974 amendments to the FECA as originally enacted in 1971,

[t]he Act . . . was predicated upon the principle of public disclosure, that timely and complete disclosure of receipts and expenditures would result in the exercise of prudence by candidates and their committees and that excess expenditures would incur the displeasure of the electorate who would or could demonstrate indignation at the polls.

1974 U.S. CODE CONG. & AD. NEWS 5588. See also *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam).

112. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 5587-5695 (1974). As amended, the FECA limits individual contributions to a candidate to \$1,000 for any one election, with PAC contributions limited to \$5,000. 2 U.S.C. § 441a(a) (1982).

113. See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 929-92 (1976).

114. See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 2860-86 (1979).

115. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 5587-5695 (1974).

116. The Supreme Court recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976), that the first amendment protects the right of individuals to make political contributions. See *infra* notes 118-119 and accompanying text.

requires corruption to hold office begins with the recognition that what is needed is not complete disclosure of campaign contributions but rather no disclosure at all of the contribution information that fuels the corruption. New legislation is needed to prohibit any contributions to a candidate or his committee other than those contributions made under a statutorily prescribed procedure that would preclude any knowledge by the candidate of the *amount* of the contribution made by any contributor. Such a procedure could be implemented, for example, by making unlawful any payments to a candidate other than through transmittal to the FEC with a form that would identify the contributor, the candidate for whom the contribution is intended, and the amount being contributed by means of a check payable to the United States. The FEC, in turn, would endorse and deposit the check to its account with the U.S. Treasury, keep a record of the contributions received for each candidate, and send to the candidate's committee in, say, \$5,000 increments, checks drawn on the FEC account with the U.S. Treasury to forward the contributions. On a quarterly basis, the FEC would provide the campaign committee, and the public, with a list of the names of the contributors to the committee but would not disclose the amounts each had contributed. Such a scheme would have several advantages.

Initially, there would seem to be little question that a procedure such as that described above could survive constitutional challenge. The Supreme Court recognized in *Buckley v. Valeo*<sup>117</sup> that, while contributions are entitled to protection under the first amendment, a restriction on the amount of a campaign contribution entails only a marginal restriction on free speech that can be satisfied by providing knowledge to a candidate that a contribution has been made.<sup>118</sup> Since, under the proposed scheme, the *identity* of the contributor will be made known to the candidate, the rationale of *Buckley* in justifying contribution limitations would be applicable. Similarly, the proposal's minimal limitation on free speech as suggested by that rationale can be supported by the same justification under the Constitution found sufficient in *Buckley*. "It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation."<sup>119</sup>

There is a more serious problem with respect to one aspect of *Buckley*, however. The *Buckley* Court noted in passing that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources

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117. 424 U.S. 1 (1976).

118. By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

*Id.* at 20-21.

119. *Id.* at 26.

necessary for effective advocacy.”<sup>120</sup> Presumably the same rationale could potentially threaten the proposed system under which information related to the amounts of contributions is unknown. Although the Court in *Buckley* was able to dismiss this concern in 1976 by noting that only 5.1% of the money raised by candidates in 1974 was obtained in amounts in excess of the \$1,000 limit it upheld,<sup>121</sup> PACs in particular provide a very substantial part of the contributions to candidates today.<sup>122</sup> When other special interest contributions are also included, what may be the majority of a congressman’s contributions could be involved. If the premise of this article is correct and the great majority of PAC and special interest contributions are made expressly or implicitly to reward past support by the congressman for the special interests’ legislative agenda and to encourage future support, then any requirement effectively imposing a limitation on a candidate’s knowledge of the source of his larger contributions would eliminate or greatly reduce the potential for the quid pro quo and, to that extent, such contributions might diminish substantially. Obviously, payments intended to buy votes cannot be expected to continue when the votes cannot be bought.

There is nothing to suggest, however, that this will necessarily reduce available campaign funds to the point that effective advocacy is impeded. As anyone who has had the misfortune to be in the same room with a television set during September and October of any even numbered year can attest, there currently exists a numbing redundancy in political speech. A reduction of such speech by half would reduce by very little the ability of candidates to communicate their ideas effectively. Moreover, lesser known or minor party candidates, and virtually all challengers to incumbent officeholders, who currently receive very little special interest support, would be able to compete much more effectively if big budget, PAC-financed campaigns by the incumbent are limited.

As indicated above, the proposed prohibition on the disclosure of the amount of a donor’s contribution is intended to eliminate not simply corruption but the appearance of corruption as well. Under the proposal, no candidate need fear accusations that his support of a measure will be attributed to his receipt of substantial contributions from special interests benefiting from the legislation as neither he nor anyone else will be able to establish whether substantial contributions were in fact made. Perhaps more importantly, the proposal protects the honest politician from the risk that he will be disadvantaged by refusing to “go along” with the system by the shift of PAC support to a less principled opponent who will. Under the proposal, no one will be able to “go along” with a system that depends for its effectiveness on knowledge by the candidate of the major sources of his funds and the system itself will eventually perish from frustration of purpose.

There are two obvious and related objections to the proposal that must

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120. *Id.* at 21.

121. *Id.* at 21 n.23.

122. See *supra* notes 29-30 and accompanying text.

be addressed. First, it might be contended that the proposal will not work since congressmen will know the identity of their contributors and the total amount received and can deduce from this whose interests he must support to ensure a continuation of the stream of contributions. On the opposite side of the same coin is the objection that the proposal will not work since there is no effective way to enforce any prohibition on the disclosure to the candidate by the PAC of the size of its contribution. Both objections miss the point and both can be answered easily in the same fashion.

It is in no way contemplated under the proposal that there should be any restriction whatever on the ability of a PAC to represent to a candidate anything it may want to about the size of its contribution after it has been made. Indeed, the proposal will only work effectively to the extent that congressmen receive, as they will, a steady stream of gushing reports from ostensible contributors attesting to the size of their supposed contributions. *The idea is that such claims cannot be proven under the proposal.* In the absence of such proof, the attempt to purchase a vote becomes essentially free both for those who otherwise would have been willing to contribute the claimed \$5,000 contribution and those who would not, or could not, have done so. It can be expected to be seen at once that there is little point in actually contributing the \$5,000 and so informing the congressman if opposing interests are contributing \$1 and telling the congressman the same thing. Even theoretically, all the congressman could ever know is that a contribution has been made through the FEC to his campaign committee by PAC *A* as well as opposing PAC *B*, that both claim to have contributed \$5,000, and that only \$5,001 was actually received. In practice, of course, the proposal would be even more effective since a number of contributions can be expected from persons other than PACs or special interests such that the actual information the congressman may have might be, for example, that the FEC has informed him that contributions were made in a given quarter by 534 named individuals and 33 named PACs (which may well represent opposing interests), that total receipts for the quarter were \$55,000, and that the PACs and special interest contributors also have informed the congressman that, in total, they contributed \$87,000. Determining who is telling the truth and who is not in this context is essentially impossible. The point is that when the large contributor loses the power to prove the size of his contribution, he is reduced to the same status as any other contributor and thus necessarily loses his power to extract the quid pro quo.

This answers both objections. The proposal will not fail to work because it permits the congressman to know the identity of his contributors since, without being able to establish which has contributed the substantial amounts, he will be unable to know whose interests he must satisfy by his votes to ensure the continuation of the contributions. It also will not fail to work because of any inability to ensure that the PAC will not disclose the amount of its contribution to the congressman since, as set out above, we can expect any number of claimants for each contribution, a process that



effectively ensures that any effort to communicate the amount of a contribution will lack credibility.

Of course, the adoption of any proposal of this nature will naturally generate at least some efforts to avoid its effect. For example, a congressman might hold a fund-raiser attended by PAC and special interest representatives and provide, "for convenience," a supply of previously completed FEC forms that require the contributor to simply add his name and the amount of the contribution. The congressman could offer, "for convenience," to mail in the forms and checks to the FEC for the contributors. This kind of evasion of the effect of the proposal would need to be precluded by the requirement that the FEC form include a certification by each contributor, enforceable by criminal penalties, that he has personally mailed or delivered the form and check to the FEC and that no disclosure has been made to anyone of the amount of the contribution prior to mailing or delivery to the FEC. Similarly, congressmen should be prohibited by criminal statute from knowingly involving themselves, or allowing any representative to become involved, in the process by which the contribution checks and forms are forwarded to the FEC. Candidates should be required to report to the Attorney General for possible criminal prosecution any effort to make known to him the amount of a contribution before it is made and also be required to certify, under penalty of perjury, as a condition for receipt from the FEC of contributions that he has had no advance knowledge of the amount of any contributions other than such knowledge as has been conveyed to the Attorney General.

Neither these procedures nor even more elaborate rules will serve to preclude entirely the occasional frustration of the purpose of the proposal by those determined to violate the law. Systematic violations, however, would be relatively easy to expose and prosecute by "sting" operations and sporadic violations would not seriously affect the basic effectiveness of the procedure.

Finally, the most important advantage of the proposal is that it in no way inhibits the *real* "legitimate campaign contribution." Such contributors contribute not because they anticipate a specific quid pro quo from the legislator benefiting their personal interests, but rather because they wish to ensure that a candidate of whose character and past conduct they approve has the means to secure or retain office. While self-interest obviously enters into this, and should, there exists a world of difference between such a contributor and a modern PAC. There is no reason to expect that the legitimate campaign contributor will be discouraged by reason of the amount of his contribution not being provable; if he is not attempting to obtain a quid pro quo, he has no need for proof of the amount of his contribution to induce it.

## CONCLUSION

Politics today is perceived as corrupt, a perception that appears all too accurate. With rare exceptions, the existing system of campaign finance virtually compels corruption as a precondition for obtaining, or at least holding onto, elected federal office. The criminal law is impotent to halt this

and, in the absence of a constitutional amendment or reconsideration by the Supreme Court of the effect of the speech or debate clause, there probably exists no possible improvement to the criminal law that might deter it.

What is needed is fundamental change to an existing system of campaign finance that is built on a foundation of the corrupt quid pro quo. My proposal is at least one way in which this can be accomplished constitutionally and practically without the disadvantages inherent in the public financing of elections. It deserves serious consideration. I have grown weary of being represented by crooks.