

INFORMAL ADVISORY OPINION NO. 97-4

The State Ethics Commission received two charges filed against a member of the state legislature. Both charges arose from the same circumstances and basically alleged the same violations of the Ethics Code. For this reason, they were consolidated and addressed together by the Commission.

The charges stemmed from the sentencing of an individual who was a former officer of an organization that had ties to state government. This individual had pleaded no contest to a felony. After the acceptance of his plea, the individual contacted a number of people and asked them to write letters to the judge attesting to his character so that the judge could consider these letters at sentencing.¹ In response to his request, the legislator who was the subject of the charges wrote a letter on behalf of the individual being sentenced. The letter was written on legislative stationery and was signed by the legislator. The legislator's state title appeared below his signature.

Attached to one of the charges was a copy of the legislator's letter to the judge. The letter began with the statement: "I write to offer comments to be considered during the sentencing of [the individual]. . . ." In the letter, the legislator explained that he was offering comments from the perspective of both a family friend and a member of the legislature. The letter mentioned the family of the individual being sentenced and also commented on the individual's role as an officer of the organization. At the close of the letter the legislator wrote:

It is my hope that these brief comments will be viewed favorably during [the individual's] sentencing. . . .

The letter made no other mention of the sentencing.

The charge also stated that the legislator took out an advertisement in a local newspaper. In the advertisement, the legislator stated that he did not condone the individual's actions and that he had written the letter as a friend of the individual's family and because of his knowledge of the individual's work as an officer of the organization. The legislator also stated in the advertisement:

The letter does not advocate a lighter sentence or minimize the seriousness of the offense. My comments were intended to provide additional information.

The charge made four allegations. First, the charge noted that this particular legislator had some control over the budget of the judiciary. In addition, this legislator had the power to appoint

¹It is not unusual for a judge to consider such letters at sentencing. HRS section 706-606 reads:

§706-606 Factors to be considered in imposing a sentence. The court, in determining the particular sentence to be imposed, shall consider:

- 1) The nature and circumstances of the offense and the history and characteristics of the defendant

The Hawaii Supreme Court has also endorsed the position that, in sentencing, a judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." State v. Alexander, 62 Haw. 112, 118 (1980) (quoting United States v. Grayson, 438 U.S. 41, 50 (1978)).

members to state boards that took action affecting the judiciary. The charge alleged that, because of these powers, the letter was an attempt to intimidate the judiciary and a violation of the separation between the branches of the judiciary and the legislature. Second, the charge alleged that the letter was not representative of the views of the legislator's constituents. Third, the charge alleged that the letter amounted to a misuse of position to grant preferential treatment to the individual being sentenced. Finally, the charge alleged that the advertisement was deceptive in that it stated that the letter did not advocate a lighter sentence and that this deception constituted "corruption in office."

The second charge was somewhat vague. Read at its broadest, it appeared to make three allegations. First, it alleged that it was improper to use state stationery to write a letter on behalf of a convicted felon. Second, it alleged that, as a result of the letter being sent on official stationery, the letter improperly intimidated the recipient. Third, it appeared to allege that the legislator gave preferential treatment to the individual being sentenced.

Pursuant to the procedures of the State Ethics Commission, the legislator was afforded an opportunity to respond to the charges. The legislator filed a single document in answer to both charges. In his answer, the legislator stated that he wrote the letter in connection with his legislative duties. The legislator considered the letter to be a form of constituent service. The legislator wrote:

I have always adhered to the principle that the broad responsibilities as a legislator require my availability and service to constituents apart from the discharge of formal legislative functions during regular legislative sessions. And it is in the spirit of this legislative intent that I exercised my constituency service role of a legislator to write the letter to [the judge] for the family of the one who was the subject of the sentencing.

As a general proposition, courts have said that a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." And that "traditionally, sentencing judges have considered a wide variety of factors in addition to evidence of guilt in determining what sentence to impose on a convicted defendant." As the sentencing judge is "largely unlimited either as to kind of information he may consider, or the sources from which it may come," it is speculative at best to conclude that my letter, one of many from the public, to [the judge] could result in any unwarranted advantage or benefit to the subject of the sentencing. Moreover, as the court is independent of the legislature, the complaints cast unfair reflection, if not insult, upon the court by inferring that [the judge] would give my letter greater weight because [of my position in the legislature]. In deference to the court's independence in the administration of justice, I neither asked for, nor expected, any special treatment by my letter. The comments in my letter were intended to provide such additional information and factors to my knowledge for the judge's consideration in the exercise of my constituency service role. I derived no personal financial gain for the letter which was not in furtherance of my private interests.

....

[P]roviding assistance to constituents in communicating and dealing with the State government by a letter to a judge for the judge's consideration toward a just sentence

constitutes a legislative duty. Letters of introduction, letters of recommendation, letters of congratulations, letters of condolences and other letters similar in nature to or for constituents by legislators in their official capacity are reasonable extensions of the duties of their offices as they promote and foster legislator/constituency interaction and access toward a meaningful representational process.

It is also noted that a legislator, as a public official, has the right to comment on matters of public interest or in connection with civic matters. My letter and comments related to a very public and civic matter under consideration by [the judge]. While not all decisions a legislator makes and actions a legislator takes will be wise or popular, that should not take away or diminish a legislator's right to comment on a matter of public interest. To take away that right would prejudice, and have a chilling effect on, the public policy that encourages legislators to be courageous, to be independent, and to speak out on public issues for a more informed public. The Ethics Code should not be construed to inhibit the representational process.

The legislator concluded his answer by asking that the Commission dismiss the charges.

The charges made a number of allegations without referring to any section of the State Ethics Code. The following accusations were made against the legislator:

- 1) The legislator misused his position as a legislator in order to grant the individual being sentenced an unwarranted benefit. This included the allegation that the letter was meant to intimidate the judge.
- 2) The letter conflicted with a legislator's duty to create and enforce laws.
- 3) The positions in the letter were not representative of the legislator's constituency.
- 4) The letter was improperly written on official stationery.
- 5) The letter violated the doctrine of separation of powers between the legislative and judicial branches.
- 6) The advertisement was misleading.

Some of these allegations did not fall within the purview of the State Ethics Code. Specifically, the second, third, and fifth allegations did not appear to fall within the Commission's jurisdiction. The second allegation was that the letter conflicted with a legislator's duty to create and enforce laws. This type of conflict was not covered by the Ethics Code. Under the Ethics Code, the term "conflict of interest" referred to conflicts between one's state duty and one's private financial interests.

The third allegation was that the letter did not accurately represent the views of the legislator's constituents. Again, the Ethics Code did not address this issue. It was left to the political process for constituents to determine whether or not a legislator was accurately representing them.

The fifth allegation was that the legislator violated the doctrine of separation of powers. This doctrine acknowledges that the governments of the United States and of the fifty states are made up of three branches: executive, legislative, and judicial. In general, one branch is not allowed to encroach on another branch. Whether or not one branch had impermissibly encroached on another was a constitutional question which lay outside of the Commission's jurisdiction.

The other three allegations--the first, fourth, and sixth--fell under the Fair Treatment provision of the State Ethics Code. In relevant part, this provision read:

§84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

.....

- 3) Using state time, equipment or other facilities for private business purposes.

.....

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

The final paragraph of the Fair Treatment law specified that the law could not be applied to prohibit action that a legislator takes in the exercise of his legislative functions. The first issue that the Ethics Commission considered was whether, by writing the letters, the legislator was exercising legislative functions. If so, then the Fair Treatment law could not prohibit the legislator's actions.

The Commission examined the history of the Fair Treatment law in order to determine what was meant by the term "legislative functions." The final paragraph of the Fair Treatment section, which referred to legislative functions, was added to the Ethics Code in 1972. The legislature proposed adding the final paragraph to the Fair Treatment section in order to forbid the Fair Treatment section from being construed to prohibit a legislator from taking action in the course of his legislative functions.

The final paragraph of the Fair Treatment law was added by House Bill 54 of the 1972 legislature. Standing Committee Report 670-72 described the addition of the final paragraph to section 84-13:

The section was also amended to provide that the proscription thereunder shall in no way prohibit a legislator from introducing bills and resolutions, serving on committees or from making any statements or taking actions in the exercise of his legislative functions. This amendment was deemed necessary to foreclose any interpretation that the bill could impose restrictions on a legislator in making any statements or taking any actions in the exercise of his legislative functions. This is in keeping with Article III, section 8, of the Hawaii Constitution, which reads in part

that "No member of the legislature shall be held to answer before any other tribunal for any statement made or any action taken in the exercise of his legislative functions. . ."

The bill was then referred to Conference Committee.

On April 12, 1972, immediately after the Standing Committee Report came out, the Ethics Commission issued a press release on the proposed changes. The Commission challenged some of the changes to the bill proposed by Senate Draft 2. The Commission recommended that the final paragraph of section 84-13, as reported out by the Senate Committee, be altered. The Commission proposed the following change:

§84-13 Add proviso as follows to 2nd full paragraph:

"Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of his legislative functions, provided that the legislator has previously filed a full and complete disclosure of the nature and extent of the interest or transaction affected by legislative action."

Reason: The removal of a legislator's action from the purview of the Commission should be accompanied by appropriate safeguards to the electorate. In a democracy, freedom of information of action by government and government officials should also include the freedom to know the conflicting financial interests of public servants. It is fundamental that a public trustee disclose financial interests which conflict with the public interest. Therefore, before a legislator takes action in the legislature on such matters, he should be required to publicly disclose the particular interest or transaction being affected by such legislative action.

The Commission's draft thus required that members of the legislature file public financial disclosures.

Conference Committee Report 17 attached a copy of the press release and incorporated it as part of the report. The report described the final version of the proviso to section 84-13. The report first recited the Commission's version proposed in the press release. It rejected the Commission's version:

Your Committee disagreed with the suggested amendment and did not include the proviso. The effect of the proviso would make the filing of a disclosure a condition precedent to any exercise of the legislative functions. Article III, Section 8, of the Hawaii Constitution provides in part that "No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of his legislative functions" The Ethics Commission, having jurisdiction under the code, and being a separate tribunal would have power to restrict and disqualify the legislator's right to exercise his legislative function if a legislator fails to file a disclosure. To restrain and disqualify a legislator from exercising his legislative functions deprives the constituents of the disqualified legislator from the representation to which they are entitled. The proviso militates against representative government. It is sufficient that failure to disclose is made a

violation under the Act and subject to the penalties thereunder. Thus, your Committee had amended the paragraph to read as follows:

"Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of his legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which he believes may be affected by legislative action."

House Bill 54 was signed into law with the proviso proposed by the Conference Committee. This language appears in the current version of section 84-13.

The Commission noted that, as referenced in the committee reports, the final paragraph of the Fair Treatment section was rooted in the constitutional grant of legislative immunity found in Article III, Section 7 of the Hawaii Constitution.² This grant of legislative immunity was not unique. Other states had similar provisions in their constitutions. The United States Constitution granted a similar immunity to members of Congress. It was contained in the Speech and Debate Clause of the Federal Constitution, located in Article I, Section 6. This provision referred to Senators and Representatives and read:

for any Speech or Debate in either House, they shall not be questioned in any other Place.

This clause was placed in the Constitution with little debate. Its purpose was to preserve the independence of Congress.

The United States Supreme Court has construed the Speech and Debate clause only a handful of times. The Court has said that the clause applies not only to speech, but "to things generally done in a session of the House by one of its members to the business before it."³ In a later case, the Court clarified that the immunity extended to legislative acts. The Court then added:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the

² Article III, section 8 was later renumbered as Article III, section 7. In relevant part, Article III, section 7 of the State Constitution reads:

No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of the member's legislative functions

³Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.⁴

The idea that acts must be legislative in nature in order to be protected by the clause was also discussed in United States v. Brewster.⁵ In this case, the Court identified a category of activities that, while legitimate activities, were political in nature rather than legislative. These unprotected political activities included:

a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress.⁶

In Brewster, whether the Speech and Debate clause provided immunity depended on whether the action in question was legislative, or whether it fell into a category of actions that the Court termed political.

While the federal cases were somewhat helpful in determining the extent of legislative immunity, the Commission was aware that legislative immunity was broader under Hawaii law than it was under federal law. The Organic Act of 1900 established the immunity in Hawaii. Section 28 of the Organic Act read:

That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions in either house.

The 1950 Constitutional Convention redrafted this language to eliminate any confusion as to whether action as well as speech was protected. The delegates originally proposed that the provision read:

No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of his legislative functions in either house.⁷

In discussions by the delegates, Delegate Heen explained why the language from the Organic Act was altered:

The immunity from liability of members of the legislature has been enlarged to include "any statement made or action taken" in the exercise of legislative functions, as compared to section 28 of the Organic Act, which limits the immunity to "words uttered." The proposed section is intended to cover written as well as oral

⁴Gravel v. United States, 408 U.S. 606 (1972).

⁵408 U.S. 501 (1972).

⁶*Id.*, at 512.

⁷2 Proceedings of the Constitutional Convention of the State of Hawaii 1950, at 146.

statements and any action taken in the exercise of legislative functions, in the broadest sense.⁸

The delegates then discussed deleting the phrase, "in either house" from the provision:

Shimamura: May I ask the question similar to the one I raised at a previous session Mr. Chairman? In other words, if you delete "in either house," you're making the provision much more expansive than it is now. Isn't that correct?

Heen: That's correct.

. . . .

Shimamura: What would be the situation of a member of the legislature who makes a speech, say at the legislative council meeting, if we have such a council? Would his immunity apply to such a speech if he makes some ordinarily--let's rather say a statement that is ordinarily defamatory, would he still be immune?

Tavares: It is my understanding that it would depend whether he was performing a legislative function or not. I am not prepared to say, without studying that further, that just because it was a legislative council meeting that there wouldn't be immunity. I believe it wouldn't be as broad possibly, but if it was in the exercise of legislative functions, as the court should find, then I think this would give immunity.

Chairman: I think the correct rule would be that it would stand on the same basis as the testimony before any public body. There is a certain immunity as you know, if you testify before the P.U. [Public Utilities] Commission, or court.

Shimamura: Well, that's just the point I mean, because if it's in the performance of the legislative function presumably the question would arise whether or not that legislative immunity would cover that situation. That's why I raise the point. The section as it stood prior to the deletion of the words "in each house," would limit it to his deliberations, his speeches, and his actions in the house.

Heen: In the exercise of his legislative functions, it might be in a committee so long as he is exercising his legislative functions, and much of the function of the legislature is performed in committee, so that if a legislative council can be regarded as a committee of the legislature that immunity might extend to the members of that council so long as they are all members of the legislature who are members of that council.

Chairman: The proposed amendment would broaden the immunity in other words.

. . . .

⁸Id.

Chairman: The question before the body is the deletion from Section 9, fifth line, after the words "legislative functions," delete the words "in either house," and the purpose of the deletion is to broaden the immunity rather than to restrict it. All those in favor signify by saying "aye." Contrary. Carried.⁹

This legislative immunity provision was placed in the Constitution as Article III, Section 7. It has never been altered or amended.

The Hawaii Supreme Court has only twice discussed the issue of legislative immunity. Abercrombie v. McClung,¹⁰ decided in 1974, was the first case to interpret the language of Article III, Section 7. This case concerned words spoken by Senate President David McClung. Senator McClung opened the legislature with a speech on education. In the speech, he wondered whether part of the faculty of the University of Hawaii had any commitment to the University. Several hours later, a reporter interviewed Senator McClung in his Senate office and asked him to clarify his remarks. The Senator referred to Neil Abercrombie as being involved in the occupation of the campus ROTC building the year before. These remarks were published in a newspaper article. Senator McClung later realized that Abercrombie had not been among those who occupied the building. Abercrombie filed a slander suit against the Senator. McClung moved for summary judgment based on legislative immunity. The trial court denied his motion. On appeal to the Hawaii Supreme Court, the Court reversed the trial court and remanded for entry of the grant of summary judgment.

The Court examined the constitutional history of Article III, Section 7. After reviewing the statements of the delegates to the 1950 Constitutional Convention, the Court stated:

We are of the opinion that the above record of the proceedings of the Constitutional Convention shows that the delegates to the Convention purposefully intended to broaden the scope of legislative immunity and further intended for the courts to finally determine the parameter of the legislative immunity by construing the clause "the exercise of his [legislator's] legislative function" on a case by case basis. The delegates did not place any restrictions premised on time and place of a legislator's exercise of his legislative function.

. . . .

We are of the opinion that when a legislator is asked to clarify a speech or statement made by him in a forum of the legislature on a subject matter of legitimate legislative concern, a subsequent clarifying statement by the legislator, though not made in a forum of the legislature, not only fulfills his duty to keep the public informed, but serves the public interest. . . . We have no doubt that strong, fearless and responsible legislators and an informed public are necessary pillars of a viable democracy.

⁹Id., at 180.

¹⁰55 Haw. 595 (1974).

The court held that Senator McClung's statements to the reporter were made in the exercise of his legislative functions and so were absolutely privileged.

The Hawaii Supreme Court again interpreted Article III, Section 7 in Mehau v. Gannett Pacific Corporation.¹¹ In this case, plaintiffs Larry Mehau and Moses Kealoha sued a number of defendants for defamation. One of the defendants was Kinau Boyd Kamalii, then a member of the State House of Representatives. After a number of press reports concerning alleged criminal activity of Mehau, Representative Kamalii introduced two resolutions in the House. The resolutions had as their objects a legislative probe into allegations made by a reporter and police protection for the reporter. At the close of session, the resolutions died. Representative Kamalii then spoke at a meeting of the Kailua Chamber of Commerce and referred to Mehau as the Godfather of organized crime. In the lower court, Representative Kamalii was awarded summary judgment on Mehau's claim that she had defamed him at the Chamber of Commerce meeting.

The Hawaii Supreme Court reviewed Representative Kamalii's claim that her statements were privileged because they were made in clarification of the resolutions, which were matters of legitimate legislative concern. The Court agreed that the subject matter of the resolutions was of legitimate legislative concern. The Court also agreed that there were no temporal or spatial limitations on the immunity. Where an action took place and when it took place were not determinative in deciding whether the action was privileged. Whether it was privileged depended on whether the action was made in the exercise of legislative functions.

The Court decided that there was not enough information to affirm a judgment in favor of Representative Kamalii. There was an issue as to whether Representative Kamalii was exercising a legislative function in making the speech. At the time of the speech, the resolutions had already died. In addition, the speech was delivered to Kailua businessmen by a representative whose constituency resided in Waikiki and Kapahulu. The Court held that, viewed in a light most favorable to the plaintiffs, the facts did not lead to an inescapable conclusion that Representative Kamalii's remarks were privileged. The Court then remanded the case for further proceedings.

In the Mehau case, the Court did not decide that the speech was not privileged. It only decided that there was insufficient evidence to determine whether it was or not. The Court focused on two facts. First, although the matter under discussion was of legitimate legislative concern, it was not currently before the legislature; unlike bills, resolutions die at the end of a legislative session. Second, Representative Kamalii was speaking to a group of people outside of her constituency. The Court's discussion indicated that a speech made on a subject of legislative concern that was currently before the legislature was more likely to be privileged. It also indicated that a speech made to one's own constituents was more likely to be privileged.

The Mehau case offered further indication that the privilege created by the Hawaii Constitution was broader than the one created by the Federal Constitution. Under federal law, a lawmaker's speech to members of the public outside of a congressional forum would not be privileged. Brewster specifically categorized such speeches as political in nature, rather than legislative. The Mehau court indicated that a speech made outside of the legislature to members of the public about a matter of legislative concern might be privileged. This was so even though the speech was not made to constituents and the matter was not currently before the legislature.

¹¹66 Haw. 133 (1983).

The initial issue that the Commission was faced with was whether or not the issuance of the letter to the judge was an exercise of a legislative function. If so, then the Commission did not have jurisdiction over whether or not the issuance of the letter violated the Ethics Code. Only the legislature could determine whether or not the exercise of a legislative function was proper or not.

Under federal law, it seemed evident that writing the letters would not be considered a legislative function. The Brewster case made this clear. In the legislator's answer the legislator characterized these letters as a form of constituent service. In Brewster, the U.S. Supreme Court labeled this type of constituent service as a political activity rather than a legislative activity. It would not be protected by the Speech and Debate clause.

While federal cases offered some guidance, the Commission was aware that it could not give too much weight to these cases. The Speech and Debate Clause of the Federal Constitution was analogous to the legislative functions clause of the Hawaii Constitution. However, the analogy was imperfect. In Abercrombie, the Hawaii Supreme Court stated:

We are of the opinion that the federal case law construing the "Speech or Debate" clause, is not helpful in the consideration of the phrase "legislative function."

Article I, Section 6, of the United States Constitution [the Speech and Debate clause] is substantially and critically different from Article III, Section 8 of the Hawaii Constitution.¹²

Unlike the U.S. Supreme Court, the Hawaii Supreme Court had not drawn a distinction between a legislator's law-making activities and his other activities. The Hawaii Supreme Court had given very little guidance on how the legislative functions clause is to be interpreted. Under Abercrombie, a statement made to the press that clarified a remark made on the floor was protected. Under Kamalii, a statement made, after a legislative session had ended, to a group outside of one's constituency about a resolution that died at the end of session may not be protected. Neither of these situations was directly applicable to the situation before the Commission.

In Abercrombie, the Hawaii Supreme Court reviewed the debates of the constitutional convention and concluded:

We are of the opinion that the above record of the proceedings of the Constitutional Convention shows that the delegates to the Convention purposefully intended to broaden the scope of legislative immunity and further intended for the courts to finally determine the parameter of the legislative immunity by construing the clause "the exercise of his [legislator's] legislative function" on a case by case basis. The delegates did not place any restrictions premised on time and place of a legislator's exercise of his legislative function.¹³

The Hawaii Supreme Court's only direction in interpreting the legislative immunity clause was that it should be interpreted broadly and on a case-by-case basis.

¹² 55 Haw, 595, 597.

¹³ Id., at 600.

As the Abercrombie case pointed out, the Speech and Debate clause and Article III Section 7 of the Hawaii Constitution were significantly different. Nonetheless, it seemed apparent that, like the Speech and Debate clause, Article III Section 8 must have its limits. In Brewster, the U.S. Supreme Court discussed the limits of the protection offered by the Speech and Debate clause:

We would not think it sound or wise, simply out of an abundance of caution to doubly insure our legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable to "relate" to the legislative process. . . . The authors of the Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.¹⁴

In Brewster the court determined that the clause could not be invoked to shield all of the activities of a member of Congress. The clause was intended to safeguard the legislative process and not to protect legislators in all of their activities. In Gravel, the court also commented on this. The court wrote:

The Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies--they may cajole, and exhort with respect to the administration of a federal statute--but such conduct, though generally done, is not protected legislative activity.¹⁵

In light of the above, the Commission believed that, like the Speech and Debate clause, the legislative functions clause must have its limits. The protection was "broad," but it was not infinite.

The Debates of the Hawaii Constitutional Convention discussed the clause in terms of giving speeches, deliberating, and taking action in committees. It did not appear that the delegates contemplated applying it to the situation in which a legislator intervened with a government agency on behalf of a constituent. Given the purpose of the legislative immunity clause, the Commission believed that it would be over-expansive to interpret the phrase "legislative functions" as including intervention with government agencies on behalf of constituents. Although this type of constituent service may be a legitimate activity for a legislator to engage in, the Commission did not believe that this conduct was shielded from the Commission's review.

¹⁴ 408 U.S. 501, 516-17.

¹⁵ 408 U.S. 606, 624-25.

Having determined that the legislator's actions in this matter were subject to HRS section 84-13, the Commission then had to determine whether or not the legislator violated that section by writing to the judge. The Commission's review of this matter revealed that this type of constituent service was common. Intervention with government agencies on behalf of constituents was referred to as casework. The term "casework" usually contemplated a legislator's intervention with executive branch agencies. This was not the situation here. However, this situation could easily be analogized to casework because it presented many of the same issues and concerns. In addition, some authorities, most notably the United States House of Representatives Ethics Manual, considered casework to include intervention with the judiciary.

On the federal level, casework was generally accepted as a part of the duties of a member of Congress. There were, however, some limits imposed on casework. Federal law forbade certain off the record comments made to agency officials or employees or to administrative law judges on the merits of formally adjudicated cases.¹⁶ This law only applied to formal adjudications. It prohibited only non-public communications. It did allow, however, "status inquiries" concerning adjudications. This law still left a great deal of room for members of Congress to intervene on behalf of constituents.

The federal courts have discussed the casework of members of Congress. In these cases the courts were not faced with the issue of whether or not it was proper for the member to intervene on behalf of a constituent. Instead, they generally considered whether the agency's resulting action was legitimate in light of the intervention.

The seminal case in this area was Pillsbury v. Federal Trade Commission.¹⁷ In this case, the court reviewed an order by the Federal Trade Commission (FTC). The FTC had ordered Pillsbury to divest itself of the assets of a company it had acquired in violation of an anti-monopoly law. As part of its review, the FTC issued an opinion that rejected a certain interpretation of the anti-monopoly law. A subcommittee of the Senate Judiciary Committee then held a hearing and called members of the FTC before it. The members were challenged on their interpretation of the law and faced with a barrage of questions. The thrust of these questions was that Congress had intended the FTC to accept the interpretation that it had rejected. The court held that, as a result of the congressional intrusion, Pillsbury did not get a fair hearing. The court said that the Congressional investigation had focused directly and substantially on the decisional processes of a commission on a case pending before it. This intruded into the commission's judicial function and raised concerns about a fair hearing and a right to an appearance of impartiality. The court then vacated the FTC's order.

The Pillsbury case applied only to formal adjudicatory proceedings held by agencies. If Congress intruded into the decisional process, then it could result in the lack of a fair hearing. A second case considered congressional intrusion into an agency decision that was not part of an agency adjudicatory process. In D.C. Federation of Civic Assns. v. Volpe,¹⁸ the Secretary of Transportation approved the building of a bridge. The court found that his decision was influenced

¹⁶ 5 U.S.C. §557(d) (1994).

¹⁷ 354 F.2d 952 (5th Cir. 1966).

¹⁸ 459 F.2d 1231 (D.C. Cir. 1971).

by a member of the House Appropriations Committee who unmistakably indicated that funds for another project would be withheld unless the bridge was approved. The court held that the Secretary's decision was invalid because it was based in part on pressure from the Representative.

In neither of these cases did the court decide that the member of Congress had acted improperly. Instead, the court held that the Congressional interference had tainted the agencies' procedures. Although the court did not hold on the appropriateness of the congressional action, these cases were nonetheless helpful when attempting to discern when intervention with an agency was inappropriate.

Congress developed its own standards governing casework. These standards evolved largely from the writings of Senator Paul Douglas, who wrote and lectured about ethics in the 1950's. In his book, Ethics in Government, Senator Douglas supported the right of a member of Congress to intervene with agencies on behalf of constituents. He then discussed three ethical guidelines that he believed legislators should observe:

1) A legislator should not immediately conclude that the constituent is always right and the administrator is always wrong, but as far as possible should try to find out the merits of each case and only make such representations as the situation permits.

....

2) A legislator should, of course, not accept any money for representing constituents or anyone else before government departments. Whatever service he gives should be as a part of his duties for which he should not seek to profit.

....

It is probably not wrong for the campaign managers of a legislator before an election to request contributions from those for whom the legislator had done appreciable favors, but this should never be presented as payment for services rendered. Moreover, the possibility of such a contribution should never be suggested by the legislator or his staff at the time the favor is done. Furthermore, a decent interval of time should be allowed to lapse so that neither party will feel that there is a close connection between the two acts. Finally, not the slightest pressure should be put upon the recipients of the favors in regard to the campaign. It should be clearly understood that any gift they make is voluntary and there will be no question of reprisals or lack of future help by the legislator if the gift is withheld. In other words, any contribution should be not a quid pro quo but rather a wholly voluntary offering based upon personal friendship and a belief in the effectiveness of the legislator sharpened perhaps by individual experience.

3) In representing individual interests before administrative bodies, the legislator should be courteous and should know the merits of the case; he should not try to bully or intimidate officials involved and he should make it clear that the final decision is in their hands.

....

[L]egislators should not try to punish administrators for adverse rulings by withholding appropriations or by other punitive actions. Certainly there should be neither any such coercion nor any such threats.

Usually the legislator should confine himself to a statement of the facts as he understands them and should let these facts tell their story without any urgent advocacy on his part. In some cases where he feels very strongly that the merits of the case demand action, he may say so, provided he makes it clear that the final decision is in the hands of the administrative agency.

. . . .

Where the legislator has great confidence in the integrity of the individuals concerned, he may mention that fact to the administrator but he should be careful not to overstate the facts.¹⁹

Senator Douglas's guidelines could be summarized as follows:

- 1) A legislator should know the facts of a case before approaching an administrator.
- 2) A legislator should not represent constituents in exchange for money or gifts.
- 3) A legislator should not threaten or punish administrators and should usually confine himself to facts without urgently advocating one position.

These guidelines were very influential in the House of Representative's development of ethical standards.

The Commission noted that a chapter of the United States House of Representatives's House Ethics Manual was devoted to casework. The Manual stated that casework was an important part of the functions of a member of the House of Representatives. It also acknowledged, however, that there were legal and ethical limits on the actions of House members engaged in casework. The legal limits cited were those developed in Pillsbury and D.C. Federation and the federal law concerning ex parte communications. The ethical limits discussed were developed in the House of Representative's Advisory Opinion No. 1. In that opinion, the House Ethics Committee outlined what actions were acceptable:

This Committee is of the opinion that a Member of the House of Representatives, either on his own initiative or at the request of a petitioner, may properly communicate with an Executive or Independent Agency on any matter to:

request information or a status report;
urge prompt consideration;
arrange for interviews and appointments;
express judgments;

¹⁹P. Douglas, Ethics in Government, pp. 88-92 (1952).

call for reconsideration of an administrative response which he believes is not supported by established law, Federal Regulation, or legislative intent; perform any other service of a similar nature in this area compatible with the criteria hereinafter expressed in this Advisory Opinion.

The opinion then set forth ethical principles to be observed when engaged in casework activity:

The Committee believes the following to be basic:

1. A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.
2. Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.
3. A Member should make every effort to assure that representations made in his name by any staff employee conform to his instruction.

The House Ethics Manual also specifically discussed congressional intervention with the courts:

Where a Member believes it necessary to attempt to affect the outcome in a pending case, he or she has a variety of options. A Member who has relevant information could provide it to a party's counsel, who could then file it with the court and notify all parties. Alternatively, the Member could seek to file an amicus curiae, or friend of the court brief. Yet another option, in an appropriate case, might be to seek to intervene as a formal party to the proceeding. A Member could also make a speech on the House floor or place a statement in the Congressional Record as to the legislative intent behind the law. A Member should refrain, however, from making an off-the-record communication to the presiding judge, as it could cause the judge to recuse him- or herself from further consideration of the case.

Where a Member does have personal knowledge about a matter or a party to a proceeding, the Member may convey that information to the court through regular channels in the proceeding (e.g., by submitting answers to interrogatories, being deposed, or testifying in court).

In contrast to the House, the United States Senate had never issued an advisory opinion on casework. However, Senate Rule XLIII affirmed a Senate member's right to intervene with an agency on behalf of a constituent so long as the decision to intervene was not based on the receipt of any contributions. This situation was much discussed in the Keating Five case, which was heard before the Senate Ethics Committee in 1990. In that case, Charles Keating, the controlling figure of Lincoln Savings and Loan, asked five senators to intercede on his behalf with the Federal Home Loan Bank Board. The Board was then investigating Lincoln. The senators held two meetings with regulators from the Board. When the regulators revealed that there would be a criminal investigation of Lincoln, most of the senators stopped their advocacy activity. Charles Keating was a large contributor to the senators' campaigns. Ultimately, the Senate disciplined only one of the Keating Five. Senator Alan Cranston was reprimanded for having engaged in an impermissible pattern of conduct in which fundraising and official activities were substantially linked.

The Senate Ethics Committee's special counsel in the Keating Five case, Mr. Robert S. Bennett, researched the issue of what ethical standards were appropriate in conducting casework. In his opening statement he set out four standards by which to judge the senators:

One, a senator should not take contributions from an individual he knows or should know is attempting to procure his services to intervene in a specific matter pending before a federal agency. . . .

Two, a senator should not take unusual or aggressive action with regard to a specific matter before a federal agency on behalf of a contributor when he knows or has reason to know the contributor has sought to procure his services.

Three, a senator should not conduct his fund-raising efforts or engage in office practices which lead contributors to believe that they can buy access to him.

Four, in addition to these, what are commonly called more objective standards, there is a well-recognized and established appearance standard. . . . And that standard is this. A senator should not engage in conduct which would appear to be improper to a reasonable, nonpartisan, fully informed person. Such conduct undermines the public's confidence in the integrity of the government and is an abuse of one's official position. Such conduct is wrong in addition to appearing to be wrong. . . .

The five involved senators objected to the fourth standard offered by Bennett, the appearance standard. They argued that they should be judged only on whether their conduct violated Senate rules, and not on how their conduct appeared. Ultimately, the Ethics Committee's decision to reprimand Cranston was not based on any specific act of misconduct, but rather on the totality of the circumstances.

This information indicated to the Commission that Congress saw nothing inherently inappropriate in casework. It appeared to be a well established activity of the members of Congress. However, ethical problems could arise when a member of Congress threatened an agency or when his intervention came in response to campaign contributions or other similar benefits.

On the state level, fewer standards were available. In 1988, the Maine Ethics Commission issued an opinion on legislative influence on state agencies.²⁰ The Maine opinion, In re Tuttle,

²⁰ As discussed in: Mark W. Lawrence, Comment, Legislative Ethics: Improper Influence by a Lawmaker on an Administrative Agency, 42 Maine L.Rev. 423 (1990).

In addition, in 1993, the state of Kentucky amended its ethics statute to add the second sentence to the following provision: "A legislator, by himself or through others, shall not use or attempt to use any means to influence a state agency in direct contravention of the public interest at large. Absent an express or implied threat of legislative reprisal, nothing in this subsection shall prevent a legislator from contacting a state agency on behalf of a person." Ky. Rev. Stat. Ann. §6.744(1). Cited in Levin, Congressional Ethics and Constituent Advocacy in an Age of Mistrust, Oct. Michigan Law Rev. 1, 37 (1996).

concerned three legislators who intervened in a matter before the Maine Real Estate Commission. One of the legislators was Senator Tuttle. The Maine Real Estate Commission was considering whether or not to suspend the license of an individual. The licensee, who was not a resident of Senator Tuttle's district, sought help from the senator. The senator sought information and requested an extension of the proceeding from the Commission. The senator and the two other legislators also wrote letters to the Commission suggesting that the investigation against the licensee should be dismissed.

In its advisory opinion, the Maine Ethics Commission applied the Maine conflicts of interests law.²¹ The Commission concluded the letter amounted to "undue influence," in part because the letter asked for a dismissal of the complaint in connection with a commitment by the legislators to seek an expansion of the Real Estate Commission's authority. The Ethics Commission also found that Senator Tuttle's motive in intervening, to assist a friend who was not a constituent, was "inappropriate." The Commission referred its opinion to the legislature for disciplinary action. The legislature took no action.²²

The advisory opinion seemed to be based on the fact that the letter requested dismissal in exchange for a legislative act, the expansion of the Real Estate Commission's jurisdiction. This promise of a benefit was essentially the flip side of the threats of reprisal that were objectionable on the Congressional level. In addition, the Maine Ethics Commission took into account the fact that the licensee was not Senator Tuttle's constituent.

In Hawaii, there were no court cases that discussed legislative intervention. However, the legislative history of the State Ethics Code appeared to contemplate legislative intervention. House Bill 6 of the 1967 legislative session created the State Ethics Code. In its committee report on the bill, the House Judiciary Committee commented on a section in the bill as follows:

This section contemplates several considerations. Legislators are obligated from time to time to appear without compensation for constituents, or in connection with public official or civic matters. Their appearance in such cases is an extension of an obligation of their offices and not in furtherance of their private interests. Stand. Com. Rep. No. 367 (1967).

²¹ Me. Rev. Stat. § 1014 (1989):

2. Undue influence. It is presumed that a conflict of interest exists where there are circumstances which involve a substantial risk of undue influence by a Legislator, including but not limited to the following cases.

A. Appearing for, representing or assisting another in a matter before a state agency or authority, unless without compensation and for the benefit of a constituent, except for attorneys or other professional persons engaged in the conduct of their professions.

Cited in 42 Maine L. Rev. 423, 445 at note 142.

²² 42 Maine L. Rev. 423, 443-45.

This comment indicated that it was acceptable for a legislator to intervene on behalf of a constituent so long as the legislator was not privately compensated. This committee report offered the most direct statement from the legislature on legislative intervention. The rules of the respective houses of the Hawaii legislature did not mention intervening on behalf of constituents. The State Constitution and Hawaii Revised Statutes were also silent on the matter.

The Hawaii State Ethics Commission believed that there was nothing per se improper about a legislator intervening with a government agency on behalf of a constituent. However, the legislator had to abide by certain standards while intervening. On the federal level, federal law required that the legislator not engage in any non-public communication with the agency. In addition, federal cases indicated that a decision from an agency could be tainted if a member of Congress intruded into the decisional processes of a quasi-judicial matter pending before an agency. A member of Congress could also taint an agency's decision process if the agency based its decision on pressure from the member. Both houses of Congress also had rules that allowed for casework.

Less information was available on the state level. The Maine Ethics Commission held that it was inappropriate for a legislator to promise an expansion of jurisdiction to an agency in exchange for a favorable outcome. The Maine Ethics Commission also believed that it was inappropriate for a senator to assist someone who was not a constituent, but instead was a personal friend. In Hawaii, it did not appear that any standards had ever been articulated. However, the legislative history of HRS chapter 84 appeared to indicate that it was acceptable for legislators to intervene on behalf of constituents provided they were not personally compensated for doing so.

As previously mentioned, the situation before the Commission was slightly different from the situation in which a legislator intervened with an executive agency. In the instant situation, the legislator's public comments were solicited through a procedure of the court. The Commission believed that if it was appropriate for a legislator to intervene with an executive agency, then it was also appropriate for a legislator to use an established mechanism of the court to intervene in a sentencing hearing. The more difficult question was whether the manner in which the legislator intervened was proper.

The Commission's review of this matter revealed a number of different standards that some authorities have said that legislators should abide by when intervening with a government agency. The standards are as follows:

1. A legislator should not make off-the-record [non-public] comments to agency personnel on the merits of formally adjudicated cases [Federal Law].
2. A legislative investigation that focuses directly and substantially on the decisional processes of a commission on a case pending before it may impermissibly intrude upon the judicial function of the agency. [Pillsbury]
3. A legislator's intrusion into the decisional process of an agency may render the decision invalid if it is based on pressure by the legislator. [D.C. Federation]

4. A legislator should know the facts of a case before approaching an administrator. [Douglas]
5. A legislator should not assist constituents in exchange for money or gifts. [Douglas]
6. A legislator should not threaten or punish administrators and should usually confine himself to facts without urgently advocating any one position. [Douglas]
7. A legislator's responsibility is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations. [U.S. House Ethics Manual]
8. A legislator should not directly or impliedly suggest either favoritism or reprisal in advance of, or subsequent to, action taken by the agency. [U.S. House Ethics Manual]
9. A legislator who has personal knowledge about a matter before a court or about a party to a court proceeding may convey that information through regular court channels. [U.S. House Ethics Manual]
10. A legislator may not base his decision to intervene upon the receipt of any contributions. [U.S. Senate Rule XLIII]
11. A legislator should not take contributions from an individual he knows or should know is attempting to procure his services to intervene in a specific matter pending before an agency. [Bennett, as Special Counsel to the U.S. Senate Ethics Committee]
12. A legislator should not take unusual or aggressive action with regard to a specific matter before an agency on behalf of a contributor when he knows or has reason to know the contributor has sought to procure his services. [Bennett, as Special Counsel to the U.S. Senate Ethics Committee]
13. A legislator should not conduct his fund-raising efforts or engage in office practices which lead contributors to believe that they can buy access to him. [Bennett, as Special Counsel to the U.S. Senate Ethics Committee]
14. A legislator should not engage in conduct which would appear to be improper to a reasonable, nonpartisan, fully informed person. [Bennett, as Special Counsel to the U.S. Senate Ethics Committee]
15. It may be inappropriate for a legislator to ask that a case pending before an agency be dismissed in exchange for legislative action that will benefit the agency. [In re Tuttle]

16. A legislator should not be compensated for appearing before an agency on behalf of a constituent. [Legislative history of the State Ethics Code]

These standards tended to center around two prongs: a legislator should not threaten retaliation or promise rewards in return for agency action, and a legislator should not condition his assistance on the receipt of any gift or campaign contribution. The Commission focused on these two standards.

The letter that the legislator sent to the judge did not threaten punishment or promise a reward. The letter briefly discussed the public service record of the individual being sentenced and asked that the judge consider this in sentencing. There was no reference to any power over the court that the legislator may have possessed.

The records of the Campaign Spending Commission for the past two years revealed that the legislator did not receive any contributions from the individual being sentenced. The gifts disclosure statements that the legislator filed with the State Ethics Commission for the past two years also revealed that the legislator did not receive any gifts from the individual being sentenced or from the organization that he worked for that would require reporting under the gifts disclosure law.

Based on its review of this matter, the Commission concluded that the legislator did not violate HRS section 84-13 by sending the letter to the judge. It was not a misuse of position for a legislator to intervene with a government agency on behalf of a constituent, provided the intervention was done in an appropriate manner. This type of constituent service was an accepted traditional activity of a legislator. A legislator could use legislative stationery to perform constituent service of this type.

The Commission believed that the legislator did not misuse her position in violation of HRS section 84-13 by intervening with the court in this case. The statements in the letter were not threatening or coercive. In addition, it appeared that the legislator did not receive any campaign contribution or other personal benefit in exchange for her actions. For these reasons, the Commission concluded that the legislator did not violate the State Ethics Code by sending the letter to the judge.

Finally, with respect to the newspaper advertisement the State Ethics Commission believed there was insufficient evidence to conclude that the advertisement was “deceptive,” as one of the charges alleged. The charge alleged that the advertisement was deceptive because the legislator stated in the advertisement that his letter to the judge did not “advocate a lighter sentence.” The complainant believed that the letter in fact did advocate a lighter sentence.

In the letter to the judge, the legislator stated that he hoped his comments would be “viewed favorably” during the sentencing. The State Ethics Commission believed that the letter to the judge asked that the sentence be consonant with what the legislator believed to be the totality of the individual’s character. The letter did not specifically request a lighter sentence, but asked for an appropriate sentence reflective, to the legislator’s mind, of the individual’s overall character. The letter to the judge was thus within the bounds of HRS section 706-606, which allowed a judge to consider the “history and characteristics of the defendant.” Such history and characteristics may

come from a multitude of sources. In light of the above, the State Ethics Commission believed that the evidence did not support a conclusion that the advertisement violated HRS section 84-13.

In summary, the State Ethics Commission found no violations of the State Ethics Code as alleged in the charges. The Commission appreciated the patience and cooperation shown by the legislator during its review of this matter.

Dated: Honolulu, Hawaii, July 2, 1997.

STATE ETHICS COMMISSION
Bernard E. LaPorte, Chairperson
Cassandra J. L. Abdul, Vice Chairperson
Carl T. Sakata, Commissioner

Note: Commissioners Kirk Cashmere and Bernice Pantell did not participate in the discussion and consideration of this opinion.