

## APPENDIX I

STATE OF MARYLAND

\* IN THE

v.

\* CIRCUIT COURT

HELEN L. HOLTON

\* FOR BALTIMORE CITY

\* Case No. 109007007

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**STATE'S OPPOSITION  
TO THE DEFENDANT'S MOTION TO DISMISS**

Now comes the State of Maryland, by Robert A. Rohrbaugh, State Prosecutor, Thomas M. McDonough, Deputy State Prosecutor, Shelly Glenn, Senior Assistant State Prosecutor, and Tamara M. Gustave, Assistant State Prosecutor, and in Answer to Defendant's Motion to Dismiss says the following:

**1. Introduction**

Defendant Helen Holton contends that, as a member of a **local government** legislative body (the Baltimore City Council), she is immune from **criminal prosecution** by the State for her actions as a member of the City Council. There is no question that this criminal indictment is founded upon and calls into question her actions as a member of the City Council.

**2. The Speech and Debate Clause**

Both the Maryland and the Federal Constitutions contain Speech and Debate clauses. These constitutional provisions, by their terms, apply only to members of Congress and, in the case of the State Constitution, the General Assembly, and protect them from both civil lawsuit and criminal prosecution for their legislative acts. Article III, §18 of the *Maryland Constitution* states: "[n]o **Senator or Delegate** shall be liable in any civil action, **or criminal prosecution**, whatever, for words spoken in debate."

Article 10 of the *Maryland Declaration of Rights* states that "freedom of speech and debate or proceedings in the Legislature, ought not to be impeached in any Court of Judicature." These speech or debate clauses pertaining to members of the Maryland General Assembly have the same origins as the Speech and Debate Clause in the U.S. Constitution. The federal Speech or Debate Clause provides that Senators and Representatives shall not be questioned in any other place "for any Speech or Debate in either House." Article I, §6 of the *United States Constitution*.

The two clauses are to be read *in pari materia*. In *Blondes v. State*, 16 Md. App. 165, 175, 294 A.2d 661, 666 (1972), the court stated "...we hold that the legislative privilege afforded under the dual provisions in the organic law of the State should be construed *in pari materia* with Article I, Section 6 of the federal *Constitution*....". See also, *Montgomery County v. Schooley*, 97 Md. App. 107, 627 A.2d 69 (1993). Courts have uniformly agreed that decisions interpreting or applying the Federal Speech and Debate Clause are highly persuasive in interpreting the State's similar Constitutional provision.

*Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984) discusses at length the history and origins of the Speech and Debate clause in English history. The clause was important in England to define the independence of Parliament in its relationship with the Crown (arguably, the early English counterpart to the American Executive Branch). A similar provision was inserted in the *Federal Constitution* and many State constitutions to guard the respective Federal or State legislatures from intrusion by a co-equal branch of government – the Executive branch. Citing *United States v. Johnson*, 383 U.S. 169, 179 (1966) and James Madison's writing in the *Federalist No. 47*, the Rhode Island

Supreme Court succinctly summarized that the purpose of a Speech and Debate clause is to ensure “[t]he separation of powers among the coordinate branches of government.” *Holmes v. Farmer*, supra, at 982. In Maryland, the Speech and Debate Clause ensures the separation of powers between the General Assembly and the Governor.

There is no historical or logical basis to extend the Speech and Debate Clause to subordinate legislative bodies of political sub-divisions of the State. These bodies are not a branch of government co-equal to the State executive branch. Clearly, the Speech and Debate Clause of the Maryland Constitution, like its Federal counterpart, does not reach beyond the protection of the General Assembly.<sup>1</sup> If the General Assembly had wished to extend the full panoply of protections encompassed with the Constitutional Speech and Debate Clause to local legislators, they had the authority to do so. They have not.

### 3. The Common Law Official Immunity Doctrine

There is, however, a common law doctrine of legislative immunity in **civil cases** that has been recognized uniformly throughout the United States, both federally and by the States, including Maryland. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367 (1951); *Thillens, Inc. v. Community Currency Exchange of Illinois, Inc.*, 729 F.2d 1128 (1984); *Montgomery County v. Schooley*, 97 Md. App. 107, 627 A.2d 69 (1993). The doctrine has often been referred to as “official” immunity. It protects legislatures generally, including legislatures within a political subdivision of the State, from being questioned in civil cases about their actions as legislators.

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<sup>1</sup> “...the State or Federal Constitutional immunity provisions... apply only to the members of the legislative bodies mentioned within them.” *Montgomery County v. Schooley*, supra, 667 A.2d at 73.

Unlike Constitutional immunity under the Speech and Debate Clause, this common law immunity is not applicable to criminal prosecutions. *U.S. v. Gillock*, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980); *U.S. v. Craig*, 537 F.2d 957 (7<sup>th</sup> Cir. 1976), (*affirming en banc the decision in U.S. v. Craig*, 528 F.2d 773 (7<sup>th</sup> Cir. 1976) for the reasons stated in the opinion of Tone, J., concurring in the judgment); *People v. Scharlau*, 141 Ill. 2d 180, 183-84 (1990). The analysis of the common law official immunity doctrine by Judge Tone of the in *Craig, supra*, 528 F.2d 782-783, adopted by the Seventh Federal Circuit Court *en banc* as the basis for its holding, is instructive concerning the reasons why this common law immunity or privilege is not applicable to criminal cases.<sup>2</sup> Judge Tone stated, "The common-law immunity of state legislators has not been held to be co-extensive with that which members of Congress enjoy under the federal speech or debate clause. Even with respect to civil liability, speech - or - debate immunity is broader than official immunity." 528 F.2d at 782 (emphasis added)

In his opinion, Judge Tone continued:

**"Unlike federal speech or debate immunity, see *United States v. Johnson*, 383 U.S. 169, 15 L. Ed. 2d 681, 86 S. Ct. 749 (1966), common-law official immunity has not been extended to criminal liability. In *O'Shea v. Littleton*, 414 U.S. 488, 503, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974), the Court said:**

**'We have never held that the performance of the duties of judicial, legislative, or executive officers requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . . On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct as proscribed by an Act of Congress. . . .' [Citing *Gravel v. United States, supra*, 408 U.S. at 627]**

<sup>2</sup> Judge Tone's opinion was subsequently cited with approval in *Thillens Inc. v. Community Currency Exchange Association of Illinois, Inc.*, 729 F.2d 1128, 1129-30 (7<sup>th</sup> Cir. 1984).

Thus judicial officers are not immune from criminal liability for conduct within the scope of their judicial duties. *Braatlien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945); see also *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939). State legislators are similarly subject to federal criminal liability for analogous conduct which falls within the prohibition of a federal criminal statute, as the Court stated in *O'Shea*.

**Immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence and fearless discharge of duty on the part of the protected officials. While the federal speech or debate clause serves the same purpose, it has an additional, more fundamental purpose grounded in the separation of powers in the federal government. As the Court said in *Gravel v. United States*, *supra*, 408 U.S. at 616, 617:**

**'The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.**

...  
The central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181, 15 L. Ed. 2d 681, 86 S. Ct. 749 (1966) . . .'

There being no problem of separation of powers between the federal executive (represented in this case by the United States Attorney) and a state legislature, the Constitution itself does not create an immunity for state legislators as it does for members of Congress. I see no need for the courts to do so either. Nothing in our history or in the authorities relied upon by the court in this case suggests that there is a threat of federal executive interference with the independence of state legislatures that would warrant extending the judicially developed doctrine of official immunity beyond its traditional boundaries. 528 F.2d at 782-83 (emphasis added)

As the court discussed above, the primary purpose of the Constitutional Speech or Debate Clause is to ensure that the separation of powers between co-equal branches of

the federal government is maintained. There is no separation of powers issue to be considered, however, when the Federal executive prosecutes State or local legislators. They are not part of a co-equal branch of the federal government.

The same reasoning applies in this case. The Baltimore City Council is not a branch of State government co-equal to the State executive branch headed by the Governor. The City Council is a local legislative body for the City of Baltimore, where executive power resides, not in the State Governor, but in the Mayor of Baltimore. To paraphrase *Craig, supra*: Nothing in our history suggests that there is a threat of state executive interference with the independence of local legislatures that would warrant extending the judicially developed doctrine of official immunity beyond its traditional boundaries.

Four years following the decision in *Craig*, the United States Supreme Court reached the issue of the scope of common law legislative privilege in *United States v. Gillock*, 445 U.S. 360, 100 S. Ct. 1185, 63 L.Ed.2d (1980). There, the Court recognized that:

... "[although] the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system." *United States v. Brewster*, 408 U.S., at 508. In deciding whether the principles underlying the federal constitutional speech or debate privilege compel a similar evidentiary privilege on behalf of state legislators, the analysis must look primarily to the American experience, including our structure of federalism which had no counterpart in England.

Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence.

*Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975).

The Supreme Court went on to reject both rationales, saying:

The first rationale, resting solely on the separation of powers doctrine, gives no support to the grant of a privilege to state legislators in federal criminal prosecutions. It requires no citation of authorities for the proposition that the Federal Government has limited powers with respect to the states, unlike the unfettered authority which English monarchs exercised over the Parliament. By the same token, however, in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power. Thus, under our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators.....

The second rationale underlying the Speech or Debate Clause is the need to insure legislative independence. Gillock relies heavily on *Tenney v. Brandhove*, 341 U.S. 367 (1951), where this Court was cognizant of the potential for disruption of the state legislative process. The issue there, however, was whether state legislators were immune from civil suits for alleged violations of civil rights under 42 U. S. C. § 1983...

**We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States v. Nixon*, 418 U.S. 683 (1974), when balanced against the need of enforcing federal criminal statutes... Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process. (emphasis supplied)**

Like the federal government in *Gillock*, the State government has a legitimate interest in enforcing its criminal statutes. While the failure to extend criminal immunity to a local legislator "may have some minimal impact" on the exercise of his [or her] legislative function, the State has an over-riding interest in enforcing its laws. As stated above, if the Maryland General Assembly had chosen to extend the Speech and Debate protections to local legislators, it would have done so.

In this case, Defendant Holton relies on an overly broad reading of *obiter dicta* in a Maryland civil case to leap to the conclusion that the common law legislative immunity extends to criminal prosecutions of local government officials. Her reliance on *Montgomery County v. Schooley, supra*, is misplaced. In *Schooley*, plaintiffs in a civil suit over local government redistricting sought to depose a member of the County Council regarding the enactment of the redistricting legislation. The court applied the widely accepted law discussed above, and concluded, not unexpectedly, that common law legislative immunity and privilege extended to the local official in this civil action.

Speaking in the context of the civil proceeding before it, the court used rather broad language in discussing the applicability and scope of the common law doctrine of legislative immunity in this civil proceeding<sup>7</sup>, saying:

Members of local legislative bodies in Maryland, like the Montgomery County Council, are not directly within the ambit of either the State or Federal Constitutional immunity provisions, which apply only to the members of legislative bodies mentioned within them. The doctrine articulated in those provisions has, however,

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<sup>7</sup> The court itself in *Schooley* acknowledged that courts sometimes enunciate broad principles that do not apply outside of the context in which they are writing. In discussing why it was departing, in *Schooley* from the "...broad statements to the effect that "legislative immunity can only be asserted by the officer who possessed it..." made by it and other courts, the Court of Special Appeals explained that, [i]n a proper context, we adhere to that view. But in the current setting, application of that principle, for the reasons just noted, would serve not to protect the privilege but, effectively, to destroy it.

been regarded as applicable to members of local and regional legislative bodies (as well as to State legislatures, in addition to any specific State Constitutional provision) as a matter of common law – the "common law doctrine of official immunity." *Thillens, Inc. v. Community Currency Exchange*, 729 F.2d 1128, 1129 (7th Cir.), cert. dismissed, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 342 (1984).  
[\*\*\*13]

Defendant Holton, ignoring the civil context in which it was written, has seized upon this and similar language in that case to assert that *Schooley* stands for the proposition that common law legislative immunity extends to State prosecutions of local government officials— an issue that was not before the Court in that civil case and, as discussed above, has been uniformly rejected.

Closer examination of the opinion of the Court and the authorities cited therein, and their context, reveals that, notwithstanding Ms. Holton's expansive interpretation, *Schooley* stands for little more than the unremarkable proposition that Maryland, like virtually every other State and the Federal government, recognizes a common law legislative privilege, applicable to local officials, **in civil proceedings**. *Thillens, Inc. v. Community Currency Exchange of Illinois, Inc.*, 729 F.2d 1128, 1129 (7th Cir.), cert. dismissed, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 342 (1984), is cited by the court in *Schooley* to support the overly broad statement that the common law doctrine of official immunity extends the Speech and Debate clause protections to local officials. However, *Thillens*, which relied partially on Judge Tone's opinion in *United States v. Craig, supra*, offers no comfort for the Defendant. In *Thillens*, the Court discussed the common law doctrine of official immunity and rightfully concluded that it does not extend to criminal actions. The Court specifically stated that "[t]he immunity extends to civil, and not to criminal liability in large part because civil immunity alone is deemed sufficient to

promote the unfettered debate necessary for the effective discharge of legislative duties.”

(Id. at 1130 and emphasis added). In footnote no. 1, the Court in *Thillens* cited *Star Distributors, Ltd. V. Marino*, 613 F.2d 4 (2d Cir. 1980) and noted “official immunity applies to civil damage and injunctive suits.”

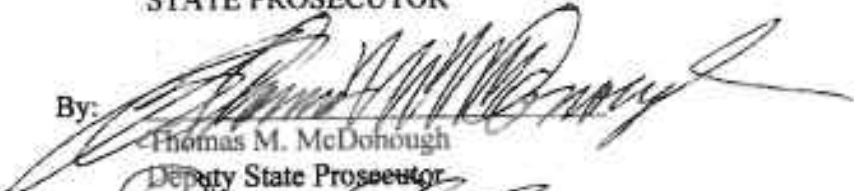
Upon this insubstantial, ephemeral base, Defendant constructs a monumental edifice of criminal law concerning the scope and application of Constitutional immunity under the Speech and Debate provisions of the Maryland and Federal Constitutions, to members of Congress and the Maryland General Assembly, citing *U.S. v. Brewster*, 408 U.S. 501 (1972), Senator Daniel Brewster; *U.S. v. Jefferson*, 546 F.3d 200 (4<sup>th</sup> Cir., 2008), Congressman William Jefferson; *Blondes v. State*, 16 Md. App. 165, 294 A.2d 661 (1972), Maryland State Delegate Leonard Blondes; *Gravel v. U.S.*, 408 U.S. 606 (1972), Senator Mike Gravel; *U.S. v. Johnson*, 383 U.S. 169 (1966), Congressman Johnson; *U.S. v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir., 1995), Congressman Dan Rostenkowski; *U.S. v. Swindall*, 971 F.2d 1531 (11<sup>th</sup> Cir., 1992), Congressman Patrick Swindall; *U.S. v. Helstoski*, 442 U.S. 477 (1979) (Helstoski I) and *U.S. v. Helstoski*, 635 F.2d 200 (3<sup>rd</sup> Cir., 1980), Congressman Henry Helstoski; *U.S. v. Dowdy*, 479 F.2d 213 (1973), Congressman John Dowdy. These cases are entirely inapposite. The Defendant in this case does not enjoy the same protection through the Speech and Debate Clause of the Maryland Constitution as members of the General Assembly. A city council member of a political subdivision is entitled only to the immunity afforded through the common law. As discussed above, the common law immunity claimed by the defendant in this case extends only to civil proceedings.

Summarized, the common law legislative immunity or privilege has not been extended to immunize the actions of local politicians from criminal corruption cases. As the Illinois Court pointed out in *People v. Scharlau, supra*, at 183-184, citing *Gillock, supra*, “[w]hile defendants [the Mayor and several Commissioners of the Town of Danville] may have been immune from civil liability under the doctrine of legislative privilege, we cannot allow them to conceal their criminal violations and escape punishment merely because they committed their crimes while performing legislative duties.”

The common law immunity claimed by Defendant Helen Holton, while fully applicable to her in a civil proceeding, is not available in a criminal case. Consequently, her motion to dismiss should be denied.

ROBERT A ROHRBAUGH  
STATE PROSECUTOR

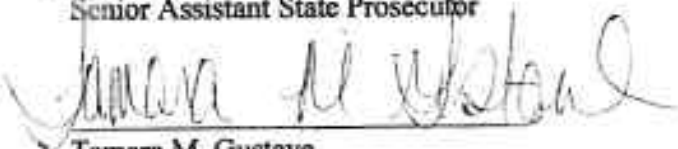
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of March, 2009 a copy of the foregoing  
Opposition to Defendant's Motion to Dismiss was sent via first class mail, postage  
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