A Common-Law Privilege for State Legislators in Federal Criminal Prosecutions

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NOTES
A COMMON-LAW PRIVILEGE FOR STATE LEGISLATORS IN FEDERAL CRIMINAL PROSECUTIONS

INTRODUCTION

Article 1, section 6 of the United States Constitution provides that, "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." Influenced by the extended struggle in England between Parliament and the Crown, the framers of the Constitution adopted the "speech or debate clause" in order to preserve the independence and integrity of the federal legislature. The clause has been interpreted to prohibit any inquiry outside the Houses of Congress into "legislative acts" or the motivation behind such acts. Thus, the speech or debate clause confers an evidentiary privilege on Congressmen which may be asserted in both civil and criminal proceedings. The privilege may develop into a substantive immunity when the evidence protected by the privilege is essential to proving the charges against the legislator. Legislative privilege is so firmly established in Amer-

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1 U.S. Const. art. 1, § 6, cl. 1.
6 The substantive immunity resulting from the speech or debate clause applies to civil actions, see Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975); Doe v. McMillan, 412 U.S. 306, 311-12 (1973); Powell v. McCormack, 395 U.S. 486, 502-03 (1969), and criminal prosecutions, see United States v. Helstoski, 99 S.Ct. 2432, 2439 (1979); Gravel v. United States, 408 U.S. 606, 624 (1972); United States v. Johnson, 383 U.S. 169, 180 (1966). Of course, the clause does not immunize congressmen from all civil or criminal prosecution, but only actions involving legislative acts or the motives for the acts. Thus, legislative acts may not form the basis of a civil or criminal action nor may the acts be introduced into evidence. United States v. Brewster, 408 U.S. 501, 512 (1972); United States v. Johnson, 383
ican government that, in addition to the federal speech or debate clause, most state constitutions furnish state legislators with similar safeguards.\(^7\)

Both federal and state courts have created comparable protection for other officials of the government to enable them to carry out their duties most effectively.\(^8\) This common law doctrine of “official immunity” bars prosecution of officers for acts performed in the course of their official duties.\(^9\) The doctrine is more restricted than

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\(^7\) Forty-three state constitutions contain provisions conferring a speech or debate privilege on state legislators. ALA. CONST. art. IV, § 56; ALASKA CONST. art. II, § 6; ARIZ. CONST. art. 4 pt. 2, § 7; ARK. CONST. art. 5, § 15; COLO. CONST. art. V, § 16; CONN. CONST. art. 3, § 16; DEL. CONST. art. II, § 13; GA. CONST. art. III, § V, ¶ XII; HAWAII CONST. art. III, § 8; IDAHO CONST. art. 3, § 7; ILL. CONST. art. 4, § 12; IND. CONST. art. 4, § 8; KAN. CONsT. art. 2, § 15; KY. CONST. § 43; LA. CONST. art. 3, § 8; ME. CONST. art. VI, pt. 3, § 8; MD. DECLARATION OF RIGHTS art. 10 and Md. CONST. art. III, § 18; MASS. CONST. pt. I, art. XXI; MICH. CONST. art. IV, § 11; MINN. CONST. art. IV, § 10; MO. CONST. art. 3, § 19; MONT. CONST. art. V, § 8; NEB. CONST. art. 3, § 26; N.H. CONST. pt. 1, art. 30; N.J. CONST. art. 4, § 14, ¶ 9; N.M. CONST. art. 4, § 13; N.Y. CONST. art. 3, § 11; N.D. CONST. art. II, § 42; OHIO CONST. art. II, § 12; OKLA. CONST. art. 5, § 22; OR. CONST. art. IV, § 9; PA. CONST. art. 2, § 15; R.I. CONST. art. 4, § 5; S.D. CONST. art. III, § 11; TENN. CONST. art. 2, § 13; TEX. CONST. art. 3, § 21; UTAH CONST. art. VI, § 8; VT. CONST. ch. I, art. 14; VA. CONST. art. IV, § 9; WASH. CONST. art. II, § 17; W. VA. CONST. art. 6, § 17; WIS. CONST. art. 4, § 16; Wyo. CONsT. art. 3, § 16.

Five states specifically exempt legislators from arrest during a legislative session but do not confer a constitutional speech or debate privilege. CAL. CONST. art. 4, § 14; IOWA CONST. art. 3, § 11; MISS. CONST. art. 4, § 48; NEV. CONST. art. 4, § 11; S.C. CONST. art. III, § 14. Only the Florida and North Carolina Constitutions confer no constitutional protection on members of the legislature.


\(^b\) Barr v. Matteo, 360 U.S. 564, 569-70 (1959); Spalding v. Vilas, 161 U.S. 483, 496-99 (1896). The doctrine of official immunity, at its inception applicable only to judicial officers, derived from the ancient rule that “the King can do no wrong,” the touchstone of sovereign immunity. Gray, Private Wrongs of Public Servants, 47 CAL. L. REV. 303, 311 (1959). Proceeding from the premise that the King was beyond reproach, it logically followed that those officials to whom he had delegated the authority to dispense justice similarly were immune from civil liability. Id. This rationale, however, “hardly acceptable to post-Revolutionary America,” was replaced by a justification of the immunity that emphasized the public benefit derived therefrom. Id.; see Stewart v. Case, 53 Minn. 62, 67, 54 N.W. 938, 938 (1893); Yates v. Lansing, 5 Johns. 282, 288 (N.Y. Sup. Ct. 1810); W. PROSSER, LAW OF TORTS § 132, at 987 (4th ed. 1971).

the speech or debate privilege, however, because it applies only in civil actions\textsuperscript{10} and sometimes provides only a qualified immunity.\textsuperscript{11}

Another possible source of protection is a common-law evidentiary privilege. All evidentiary privileges in federal civil and criminal actions are governed by Rule 501 of the Federal Rules of Evidence (Rule 501),\textsuperscript{12} which provides that the existence of a privilege must be determined in accordance with "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." When a state legisla-


\textsuperscript{11} Unlike the speech or debate privilege which affords absolute immunity to legislators for their legislative acts, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975), the doctrine of official immunity confers only a qualified immunity on some officials, provided they act in good faith, e.g., Wood v. Strickland, 420 U.S. 308, 321 (1976) (school-board members); Pierson v. Ray, 380 U.S. 547, 555-57 (1967) (police officers). Although at one time the law was settled that high ranking executive officials possessed absolute immunity, see Barr v. Matteo, 360 U.S. 564, 571 (1959), later pronouncements from the Supreme Court, see Wood v. Strickland, 420 U.S. 308, 322 (1975); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974), created considerable uncertainty as to the standard of immunity to be applied to federal executive officers. See Note, \textit{Federal Executive Immunity from Civil Liability in Damages: A Reevaluation of Barr v. Matteo}, 77 COLUM. L. REV. 625, 625 (1977). Most recently, in Butz v. Economou, 438 U.S. 478 (1978), the Supreme Court, while not expressly overruling \textit{Barr}, held that where a constitutional violation was involved, federal executive officials were entitled only to a qualified immunity, except in "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." \textit{Id.} at 507 (footnote omitted).

\textsuperscript{12} Rule 501 of the Federal Rules of Evidence, in pertinent part, provides:

\texttt{Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.}

Rule 501, the only codification in the Federal Rules of Evidence to deal with the subject of privilege, see S. SALTBURG \\& K. REDDEN, \textit{FEDERAL RULES OF EVIDENCE MANUAL} 198 (2d ed. 1977) became effective on July 1, 1975, and was derived from Rule 26 of the Federal Rules of Criminal Procedure, 10 \textsc{Moore's} \textit{FEDERAL PRACTICE} § 501.04[1] (2d ed. 1979). Prior to the adoption of the Federal Rules of Criminal Procedure in 1944, the standards for determining the controlling law in federal criminal prosecutions, including rules of evidence, were muddled by "a maze of ambiguous and conflicting judicial and legislative pronouncements." Howard, \textit{Evidence in Federal Criminal Trials}, 51 YALE L.J. 763, 763 (1942). The Supreme Court early had held that the Rules of Decision Act, ch. 20, § 34, 1 Stat. 73 (1789) (current version at 28 U.S.C. § 1652 (1976)), which directed the federal courts to use the evidentiary laws of the states unless the Constitution or a federal statute provided otherwise, did not apply to criminal proceedings. United States v. Reid, 53 U.S. (12 How.) 361, 363 (1851). The
tor is sued or prosecuted in federal court, the courts have had difficulty in determining the extent if any to which a legislative privilege attaches. Although the Supreme Court has granted state legislators a "legislative privilege" when sued for damages in federal court under section 1983 of the Civil Rights Act, whether the "privilege" was founded in the constitutional speech or debate clause or the common-law official immunity doctrine was not made clear. Recently, a conflict has developed among the circuit courts of appeals concerning whether a federal common-law legislative privilege exists for state legislators prosecuted on federal criminal charges.

As the Supreme Court contemplates the issue for the first time, this Note will explore the problems involved in adopting a federal common-law privilege. The origin and judicial development of the speech or debate clause of the United States Constitution will be discussed to the extent necessary to define its general scope and contemporary justifications. The conflicting arguments advanced in circuit court cases that have considered the legislative privilege question will be examined in detail. The Note will then demonstrate that neither the constitutional privilege as construed by the Supreme Court, nor its historical roots, prohibit state legislators from receiving protection in federal criminal actions. Finally, the role the state governments play in our federal system will be studied.

Reid Court determined that the law of evidence of the forum state, as it was in 1789, controlled criminal actions. Id. at 363, 366. If the forum state had not been admitted into the Union in 1789, the law existing on the date of admission applied. Logan v. United States, 144 U.S. 263, 303 (1892). Subsequent cases, however, relaxed the rule of strict insistence on conformity to local law. See Wolfe v. United States, 291 U.S. 7, 12-13 (1934); Funk v. United States, 290 U.S. 371, 379, 382 (1933). Finally, it was statutorily mandated, through Rule 26 of the Federal Rules of Criminal Procedure and Rule 501 of the Federal Rules of Evidence, that the admissibility of evidence in federal criminal prosecutions would be determined by federal law and not state law. See United States v. Craig, 528 F.2d 773, 776 (7th Cir.), modified per curiam, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976). State rules of evidence now apply only in those civil proceedings where "[s]tate law supplies the rule of decision." FED. R. EVID. 501.

See notes 49-51 and accompanying text infra.

See United States v. Gillock, 587 F.2d 284 (6th Cir. 1978), cert. granted, 99 S.Ct. 2159 (1979); United States v. DiCarlo, 565 F.2d 802 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978); In re Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977); United States v. Craig, 528 F.2d 773, modified per curiam, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976); notes 60-103 and accompanying text infra.


See notes 60-100 and accompanying text infra.

See notes 101-129 and accompanying text infra.
in order to establish the necessity for conferring the benefits of an evidentiary privilege, similar to the speech or debate clause, on state legislators in the criminal context.\textsuperscript{21}

**THE ORIGIN OF THE CONSTITUTIONAL PRIVILEGE**

The legislative speech or debate privilege in the United States was the product of the sixteenth and early seventeenth century power contests between Parliament and the Crown.\textsuperscript{22} Parliament, traditionally recognized as the highest court of the land, gradually sought to assert its rights as the lawmaker.\textsuperscript{23} The Crown, however, restricted parliamentary attempts to initiate legislation. Members of Parliament who dared to question the authority, judgment, or policies of the Crown were subjected to various forms of intimidation, including arrest and imprisonment.\textsuperscript{24} To deal with the repressive actions, Parliament repeatedly requested the Crown to recognize its right to free speech in debate\textsuperscript{25} and passed legislation nullifying all prosecutions arising from parliamentary proceedings.\textsuperscript{26} Finally, in 1689 parliamentary freedom of speech and debate was incorporated into the English Bill of Rights,\textsuperscript{27} thereby assuming an unassailable position in English law.

The engineers of the American Government, well aware of the need to prevent threats of litigation or imprisonment from deterring

\footnotesize{\textsuperscript{21} See notes 130-42 and accompanying text infra.  
\textsuperscript{22} See authorities cited in note 2 supra.  
\textsuperscript{23} See Cella, supra note 2, at 4; Reinstein & Silverglate, supra note 2, at 1122, 1126; Veeder, supra note 2, at 132.  
\textsuperscript{24} See C. Wittke, supra note 2, at 23-29; Cella, supra note 2, at 6-11; Reinstein & Silverglate, supra note 2, at 1126-27; Veeder, supra note 2, at 132-33.  
\textsuperscript{25} An official request to recognize the privilege of freedom of speech in Parliament had been made to the Crown as early as 1541. Cella, supra note 2, at 6.  
\textsuperscript{26} Privilege of Parliament Act, 1512, 4 Hen. 8, c. 8. The law was passed in response to the conviction of Richard Strode, a member of the House of Commons, for interfering with tin mining by introducing bills to regulate the trade. The Privilege of Parliament Act specifically annulled Strode's conviction and called for his release, in addition to declaring void all similar future prosecutions. See C. Wittke, supra note 2, at 25 n.16; Cella, supra note 2, at 6; Veeder, supra note 2, at 132 n.5.  
\textsuperscript{27} Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The English Bill of Rights provision stated "[t]hat the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." I W. & M. sess. 2, c.2 (1689); see Kilbourn v. Thompson, 103 U.S. 168, 202 (1880); Stockdale v. Hansard, 112 Eng. Rep. 1112, 1140 (1839). The English Parliamentary privilege was construed frequently in the nineteenth century. See Cella, supra note 2, at 12. In Ex parte Wason, [1869] L.R. 4 Q.B. 573, the court held that a conspiracy to make false statements in the legislature was not a prosecutable offense under English law. Id. at 573-74. Mr. Justice Lush noted: "[T]he motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." Id. at 577.
or intimidating legislators in the performance of their duties, included the doctrine of legislative privilege in both the Articles of Confederation and the Constitution without significant debate. At the time the Constitution was drafted, three state constitutions contained similar provisions. The first court in the United States to address legislative privilege was the Supreme Judicial Court of Massachusetts in Coffin v. Coffin. Described by one commentator

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2 See Tenney v. Brandhove, 341 U.S. 367, 373-74 (1951); Cella, supra note 2, at 13; Reinstein & Silverglate, supra note 2, at 1138-39; Privilege for State Legislators, supra note 8, at 38. The sentiment of the Framers was probably best summarized by James Wilson, who was a member of the committee from which the constitutional provision emerged.

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

II WORKS OF JAMES WILSON 38 (J. Andrews ed. 1896).

Article 5 of the Articles of Confederation provided: "Freedom of Speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . ." Tenney v. Brandhove, 341 U.S. 367, 372 (1951). No record of any debate on the language, scope, or purpose of the Articles of Confederation provision has been found. See Reinstein & Silverglate, supra note 2, at 1136 n.122. Similarly, the speech or debate privilege was adopted unanimously at the Constitutional Convention. Cella, supra note 2, at 14. Two minor modifications were proposed but never adopted: the first, by William Pinckney, suggested that the respective Houses of Congress should be the exclusive interpreters of the scope of the privilege, and the second, by James Madison, proposed that the scope of the privilege be delineated. Id. at 14-15.

Although the speech or debate privilege apparently was not recognized in the early colonial charters, see D. WATSON, THE CONSTITUTION OF THE UNITED STATES 324 (1910), three state constitutions expressly conferred the privilege on state legislators before the federal Constitution was adopted. Maryland's Constitution, adopted in 1776, stated "[t]hat freedom of speech, and debates or proceedings, in the legislature, ought not to be impeached in any other court or judicature." Md. DECLARATION OF RIGHTS, art. VIII. The Massachusetts and New Hampshire constitutions, Mass. Const. DECLARATION OF RIGHTS, art. 21 (1780); N.H. Const. pt. 1, art. 30 (1784), contained virtually identical grants of legislative privilege. See generally Tenney v. Brandhove, 341 U.S. 367, 373-74 (1951). Two other states, South Carolina and New Jersey, constitutionally provided for legislative privilege by specifically preserving English law. Id. at 374 n.3.

4 Mass. 1 (1808). Coffin was a defamation action brought by one member of the Massachusetts House of Representatives against another representative. The plaintiff, William Coffin, had asked Benjamin Russell, a fellow legislator, to introduce a resolution authorizing the appointment of another notary public in Nantucket. Id. at 3-4. After the resolution had been passed, the defendant, Micajah Coffin, questioned Russell in the hallway of the House about the source of the information behind the resolution. Id. at 4. When Russell indicated that it was William Coffin, the defendant exclaimed "What, that convict?", an obvious reference to the plaintiff's previous prosecution for bank robbery. Id. When reminded that he had been acquitted of the charges, Micajah replied, "That did not make him the less guilty . . . ." Id. Although the defendant did not deny making the statement, at trial he contended that it was justifiable under the speech or debate clause of the Massachusetts constitution. Id.
as "the classic American formulation,"\textsuperscript{31} the \textit{Coffin} decision was to profoundly affect interpretations of the federal speech or debate clause.\textsuperscript{32} The \textit{Coffin} court concluded that the privilege embodied in the Massachusetts constitution\textsuperscript{33} existed not for the personal benefit of the legislators but "to support the rights of the people" by allowing elected representatives to discharge their official responsibilities without fear of civil or criminal liability.\textsuperscript{34} The \textit{Coffin} court determined that it was necessary to construe the privilege liberally in order to effectuate its purposes.\textsuperscript{35} In addition to legislative speech, therefore, the court found that the privilege applied to every act "resulting from the nature, and in the execution of the office."\textsuperscript{36}

Perhaps indicative of the extent to which the doctrine of legislative freedom of speech had been entrenched in the American system of government, more than 90 years after its incorporation into the Constitution had passed until the Supreme Court was called upon to interpret the scope of the federal legislative privilege. \textit{Kilbourn v. Thompson}\textsuperscript{37} was a civil action for false imprisonment against the members of a House of Representatives investigative committee that had ordered the plaintiff's arrest for his refusal to testify

\textsuperscript{31} Cella, \textit{supra} note 2, at 18.
\textsuperscript{32} Even though \textit{Coffin} involved the interpretation of a state provision, broader in language than the federal speech or debate clause, \textit{compare} Mass. Const. Declaration of Rights, art. 21 (1780) \textit{with} U.S. Const. art. I, § 6, cl. 1, it has been cited by the Supreme Court in at least five cases construing the scope of the federal clause. \textit{See} Hutchinson v. Proxmire, 99 S.Ct. 2675, 2683 (1979); United States v. Helstoski, 99 S.Ct. 2432, 2441 (1979); Gravel v. United States, 408 U.S. 606, 660 (1972) (Brennan, J., dissenting); United States v. Brewster, 408 U.S. 501, 513, 515 (1972); Kilbourn v. Thompson, 103 U.S. 168, 203 (1880). \textit{See also} Tenney v. Brandhove, 341 U.S. 367, 373-74 (1951). \textit{Coffin} also has been cited by two of the circuit courts of appeals while addressing the issue whether a common-law speech or debate privilege exists. \textit{See} United States v. Gillock, 587 F.2d 284, 293 n.10 (6th Cir. 1978), cert. granted, 99 S.Ct. 2159 (1979); \textit{In re} Grand Jury Proceedings, 563 F.2d 577, 583 (3d Cir. 1977).
\textsuperscript{33} 4 Mass. at 27.
\textsuperscript{34} Id.
\textsuperscript{35} Id. The Court stated: [Legislative privilege is secured] not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally . . . I will . . . extend it to . . . every . . . act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office . . .
\textsuperscript{36} Id. Despite the undeniably liberal construction given the clause by the court, it was found not to apply in \textit{Coffin}. Id. at 30-31.
\textsuperscript{37} 103 U.S. 168 (1880).
before the committee. The Court held that the Representatives were not liable even though they had no power to authorize the arrest. Citing Coffin, the Kilbourn Court held that, in addition to oral expression, the speech or debate clause protected “things generally done in a session of the House by one of its members in relation to the business before it.”

Seventy years later, the Supreme Court again focused on the speech or debate clause in Tenney v. Brandhove, a civil suit against state legislators under section 1983 of the Civil Rights Acts. In Tenney, the plaintiff commenced the action after being cited for contempt for refusing to testify before a California senate investigatory committee. Addressing the state senators’ claim of legislative privilege, it was found that the privilege guarantees “the fullest liberty of speech [in order to] protec[t] [individual legislators] from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.” The Court concluded that Congress had not intended to abrogate this privilege when it passed the Civil Rights Acts. Determining that the con-

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34 Id. at 170-73. Also named as defendant was Thompson, the Sergeant-at-Arms who effectuated the arrest. Id. at 170.
33 Id. at 199-200.
32 Id. at 203-04. Despite its liberal interpretation of the range of activity contemplated by the clause, the Kilbourn Court restricted the application of the privilege to the legislators themselves, holding that the constitutional provisions did not protect the Sergeant-at-Arms who had carried out the illegal arrest. Id. at 205. The Kilbourn decision has been criticized on the ground that exclusion of the actual arrest from the scope of the privilege nullified whatever protection had been afforded to the congressional act ordering the arrest. See Cella, The Doctrine of Legislative Privilege of Speech and Debate: The New Interpretation as a Threat to Legislative Coequality, 8 SUFFOLK U.L. REV. 1019, 1060, 1062 (1974).
30 42 U.S.C. § 1983 (1976). The action also was based on § 1985(c) of the Civil Rights Acts. 341 U.S. at 369. These statutes provide a civil remedy against anyone who deprives, id. § 1983, or conspires to deprive another person of his constitutional rights, id. § 1985(c).
32 341 U.S. at 370-71. Brandhove had circulated a petition in the California legislature seeking to prevent funding of the Senate Fact-Finding Committee on Un-American Activities, of which Tenney was the head. Id. at 370. When the committee called Brandhove to explain the charges made in his petition, he refused to testify. Id. Claiming damages in excess of $10,000, Brandhove alleged that the committee hearing “was not held for a legislative purpose” but rather “to intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances.” Id. at 371.
31 See id. at 372-78. The Court analyzed the origins and purposes of the speech or debate clauses of the United States Constitution and of the three states whose constitutional privileges predated the federal provision. Id. at 372-75. It is important to note, however, that California had no constitutional speech or debate protection at that time. See id. at 375 n.5; notes 44-45 and accompanying text infra.
33 Id. at 373 (quoting II WORKS OF JAMES WILSON 38 (J. Andrews ed. 1896)).
34 341 U.S. at 376.
duct of the state senate investigatory committee had been “within the sphere of legislative activity,” the Tenney Court held that the defendants were not liable.48

Tenney is the only case in which the Supreme Court has considered the safeguards available to state legislators in federal actions. The Court devoted much discussion to the federal speech or debate clause and the constitutionally-guaranteed legislative privileges recognized in states outside of California but never specified the source of the defense asserted by the California state senators.49 Rather, the Court merely attached the generic label “legislative privilege” to the protection.50 This ambiguity has led some authorities, including the Court itself, to the conclusion that the Tenney Court conferred a common law immunity, and not a speech or debate privilege, on the state senators in order to exempt them from section 1983 liability.51

In United States v. Johnson,52 the Supreme Court interpreted the speech or debate clause in the context of a criminal suit for the first time. In order to prove that a Congressman had engaged in a conspiracy to defraud the United States, the government sought to establish that the Member was paid to deliver a speech in the House of Representatives favorable to savings and loan associations.53 The

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48 Id. at 376-78. The Tenney Court concluded that “[t]he claim of unworthy purpose [would] not destroy the privilege” if the legislator otherwise was acting within the legislative area. Id. at 377. Questioning the motives of the legislator, stated the Court, would significantly undermine the purposes of the privilege. Id.


50 341 U.S. at 378.


53 383 U.S. at 171-72. Johnson, a former member of the United States House of Representatives, was charged with violating the federal conflict of interest statute, 18 U.S.C. § 281 (1976), and with conspiring to defraud the United States, 18 U.S.C. § 371 (1976), by attempting to procure the dismissal of mail fraud indictments against a lending company and its
Court concluded that the initiation of criminal charges against a critical legislator by an unfriendly executive was the main reason for adopting a parliamentary privilege in England and, “in the context of the American system of separation of powers, [was] the predominant thrust of the Speech or Debate Clause.”4 Relying on Kilbourn and Tenney, the Johnson Court stated that “the legislative privilege will be read broadly to effectuate [this] purpose.”5 The Court held, therefore, that the speech or debate clause of the United States Constitution prohibited the government not only from introducing the Congressman’s speech into evidence, but also from inquiring into his motivations for giving the speech.6

Despite the Court’s initial willingness to extend broadly the scope of the constitutional privilege,7 recent cases indicate that the Court is taking a more restricted approach.8 Nevertheless, its pro-

4 383 U.S. at 182.
5 Id. at 180.
6 Id. at 177-85. The Court concluded that, since the theory of the government required proof that Johnson’s speech was improperly motivated, the speech or debate clause proscribed the prosecution. Id. at 180, 184-85. Expressly limiting its holding to the situation involved in the Johnson case, the Court indicated that a criminal prosecution could proceed against the Congressman provided his acts or motivations are not brought into question. Id. at 185. The Court, therefore, remanded the case to allow the government to attempt to establish the conspiracy through the use of other evidence. Id. The Supreme Court repeatedly has held that the speech or debate clause shields from inquiry legislators’ motives or intentions. See Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 508 (1975); United States v. Brewster, 408 U.S. 501, 525 (1972); Tenney v. Brandhove, 341 U.S. 367, 377 (1951). See also United States v. Doe, 455 F.2d 753, 758 (1st Cir.), aff’d in part sub nom. Gravel v. United States, 408 U.S. 606 (1972); McGovern v. Martz, 182 F. Supp. 343, 346 (D.D.C. 1960).
8 In United States v. Brewster, 408 U.S. 501 (1972), the Court held that, rather than protecting everything “within the sphere of legislative activity,” Tenney v. Brandhove, 341 U.S. 367, 376 (1951), the speech or debate clause only extends to acts that are “clearly a part of the legislative process—the due functioning of the process,” 408 U.S. at 516. The Brewster Court concluded, therefore, that the speech or debate clause does not prohibit the prosecution of a Congressman for accepting a bribe in exchange for doing an official act, insofar as the government would not have to rely on legislative acts or motivations for those acts to prove that the Senator had taken the bribe. Id. at 525-29. It is important to note, however, that Brewster differed factually from United States v. Johnson, 383 U.S. 169 (1966), where a conspiracy prosecution depended on establishing that a speech made by the defendant Congressman was improperly motivated. Id. at 180; note 53 supra. The Johnson Court found the prosecution barred by the constitutional clause. Id. Gravel v. United States, 408 U.S. 606 (1972), another case restricting the scope of the clause, concerned a grand jury investigation of the disclosure of the celebrated Pentagon Papers. Id. at 606. The issue was whether the Senator’s side could be compelled to testify before a grand jury concerning the release and republication of the papers after the Senator had revealed a large part of their contents at a
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Protection is undoubtedly broader than that provided by the common-law official immunity doctrine since the privilege can be asserted in both civil and criminal proceedings. Thus, it has become crucial to determine whether the protections afforded a state legislator in a federal criminal prosecution, in the form of a federal common-law privilege under Rule 501, are commensurate with the safeguards supplied by common-law immunity or by the speech or debate clause of the United States Constitution.

THE CONFLICT AMONG THE CIRCUITS

The seventh circuit was the first court to confront the issue in United States v. Craig, a prosecution of several state legislators for extortion and related offenses. After testifying under subpoena before a grand jury investigating the charges, one of the legislators raised the state and federal speech or debate clauses in an effort to suppress the grand jury testimony at his subsequent criminal trial. The district court ruled that the state legislator was protected by the Illinois constitutional privilege.


The Court's narrow construction of the constitutional speech or debate clause has been criticized as undermining the ability of the clause to fulfill its intended functions. See Ervin, The Gravel and Brewster Cases: An Assault on Congressional Independence, 59 Va. L. Rev. 175 (1973); Reinstein & Silverglate, supra note 2, at 1148-71; Comment, Brewster, Gravel and Legislative Immunity, 73 Colum. L. Rev. 125 (1973).

See notes 9-11 and accompanying text supra.

528 F.2d 773, modified per curiam, 537 F.2d 956 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976).

The Craig defendants were charged with violating the Hobbs Act, 18 U.S.C. § 1951 (1976), an anti-corruption measure, and the Mail Fraud Statute, id. § 1341. 528 F.2d at 774.

528 F.2d at 774. The wording of the state provision was substantially identical to the federal provision. Compare U.S. Const. art. I, § 6, cl. 1, with Ill. Const. art. 4, § 12.

528 F.2d at 774.
On appeal, a divided seventh circuit panel disagreed with the lower court's conclusion that the state constitutional privilege was applicable to a federal criminal prosecution but nevertheless determined that a federal common-law privilege could be invoked by the state legislator. The court rejected the government's contention that, since the privilege was designed to preserve the separation of powers among coequal branches of government, it does not apply when a state legislator is questioned by the federal executive because the supremacy of the national government precludes the existence of a separation of powers controversy. The court maintained that the government's argument overlooked the federal nature of the American system whereby the powers not specifically granted to the national government are retained by the individual states. On matters of local concern, the court reasoned that state legislatures play as important a role in state government as Congress plays in governing the entire nation. Finding the primary purpose of the speech or debate privilege to be to allow legislators to carry out their obligations freely and without intimidation by other governmental units, the Craig court concluded that the chilling effect on the legislators would be the same whether the threat of executive interference originated at the national or state level. As a result, the court found a federal common-law speech or debate privilege pursuant to Rule 501 necessary in federal prosecutions of state legislators to preserve the independence of the legislatures of


4 528 F.2d at 779. The conclusion that a common-law privilege could be invoked was predicated in part on the legislative history of Rule 501, which was found to indicate no intention "to override the common law privilege inherent in the Speech or Debate Clause of the federal and state constitutions." Id. at 776. As the Craig court noted, the original draft of Article V of the Federal Rules of Evidence expressly limited the privileges the federal courts were required to recognize. In addition to nine listed privileges were those either constitutionally or statutorily mandated. Id.; see S. SALTZBERG & K. REDDEN, supra note 13, at 200. Since this would have abolished or modified common-law privileges, the original draft was vigorously opposed. 528 F.2d at 776. As a consequence, Congress eliminated the enumeration of the privileges and enacted Rule 501, preserving federal common-law privileges in criminal actions. See note 13 supra. This apparent attempt to placate the critics of the more explicit provisions contained in the preliminary draft has been criticized on the ground that the rules of privilege "are left in the confused state they were in prior to the enactment of the Rules." S. SALTZBERG & K. REDDEN, supra note 13, at 201.

9 528 F.2d at 778.
9 Id.
9 Id.
9 Id.
the several states. The seventh circuit reversed the district court's suppression order, however, on the ground that the senator had waived his speech or debate privilege when he testified before the grand jury.

In an opinion concurring in result only, Judge Tone disputed the majority's recognition of a federal common-law speech or debate privilege for state legislators. Relying on Tenney v. Brandhove, he stated that the protection enjoyed by state legislators prosecuted in federal court was limited to immunity from civil suit under the doctrine of official immunity. Reasoning that the existence of an evidentiary privilege depends upon whether there is an analogous substantive immunity, Judge Tone concluded that there could be no substantive immunity because this was a criminal case and there was no justification for granting the state legislator a testimonial privilege. Judge Tone supported his conclusion by interpreting the purposes of the constitutional speech or debate clause and the common-law official immunity doctrine. He found that the latter was adopted by the courts to enable government officials to perform their duties without the threat of litigation, which was satisfied by

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70 Id. at 779.
71 Id. at 781. The court stated that the speech or debate privilege is waivable by an individual legislator only when the inquiry does not affect the independence of the other members. Id. at 780. According to the court, waiver need not be "knowing and intelligent." Id. at 781; see Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Rather, the waiver must be the "'product of an essentially free and unconstrained choice by its maker,'" 528 F.2d at 781 (quoting Schenckloth v. Bustamonte, 413 U.S. 218, 225 (1973)), since the policy served by the privilege is unrelated to the fairness of the trial, 528 F.2d at 781. The United States Supreme Court recently addressed the issue of the appropriate standard of waiver of the privilege conferred by the federal speech or debate clause in United States v. Helstoski, 99 S.Ct. 2432, 2440 (1979).
72 528 F.2d at 781.
74 528 F.2d at 782. The Supreme Court, in three recent cases dealing with the liability of state officials pursuant to § 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1976), has discussed Tenney in the context of official immunity. See Wood v. Strickland, 420 U.S. 308, 316-18 (1975); Scheuer v. Rhodes, 416 U.S. 232, 243-44 (1974); Pierson v. Ray, 386 U.S. 547, 553-55 & n.9 (1967); Judge Tone contended that the Supreme Court's alignment of Tenney with these later official immunity cases indicated that the Court would read Tenney to foreclose the extension of a common-law speech or debate privilege to state legislators. 528 F.2d at 782; see Privilege for State Legislators, supra note 8, at 50.
75 528 F.2d at 782-83; note 10, supra. The proposition that the granting of an evidentiary privilege should be precluded in the absence of a substantive immunity was cited with approval in United States v. DiCarlo, 565 F.2d 802 (1st Cir. 1977), cert. denied, 436 U.S. 924 (1978), wherein the first circuit stated: "If there is 'no limitation on . . . enforcement,' we see no basis for creating a limitation that handicaps proof." Id. at 807. But see note 112 and accompanying text infra.
76 528 F.2d at 782-83.
77 Id. at 783.
immunizing officials from civil liability only. On the other hand, the speech or debate clause provides Congressmen more extensive protection in order to preserve the separation of powers in the federal government. To achieve this result, Judge Tone reasoned, Congressmen also must be safeguarded from intimidation by the executive branch. On rehearing en banc, Judge Tone's concurring rationale was endorsed without further explication by a majority of the seventh circuit.

Subsequently, the first circuit, in an opinion which relied extensively on the rationale of the Craig concurrence, unanimously refused to extend a common-law evidentiary privilege to state legislators in federal criminal prosecutions. A divided third circuit, however, indicated that it agreed with the decision of the Craig panel and would recognize the existence of the privilege.

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7 Id.
79 Id.
80 Id.
537 F.2d 957, 958 (7th Cir.) (en banc) (per curiam), cert. denied, 429 U.S. 999 (1976). On rehearing en banc, Judge Cummings, author of the panel majority opinion, and Judge Swygert maintained that a common-law speech or debate privilege exists and should be recognized. Chief Judge Fairchild subscribed to the position that federal courts are required to recognize state constitutional privileges because of "the constitutional relationship between the states and the United States." Id. at 958-59.

8 United States v. DiCarlo, 565 F.2d 802 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978). DiCarlo involved the prosecution of Massachusetts state senators for conspiracy to violate the Hobbs Act and other federal laws. Id. at 803. In summarily disposing of the claim of privilege, the court indicated that the only protection from federal liability available to a state legislator was afforded by the doctrine of official immunity which applies only to civil actions. Id. at 806. The first circuit was not dissuaded by the defendants' contention that the federal nature of American government required an extension to state legislators of the safeguards that are similar to those enjoyed by Congressmen under the speech or debate clause. Id. Noting that the instant prosecution involved issues of "federal supremacy," the court held that "the federal-state relationship [could not override] the government's need of evidence of federal crime." Id.

82 In re Grand Jury Proceedings, 563 F.2d 577, 583 (3d Cir. 1977). Grand Jury Proceedings involved an attempt by a Pennsylvania state senator and the chief clerk of the senate to intervene in the federal government's enforcement of subpoenas duces tecum. Id. at 579. The court initially determined that the constitutional speech or debate clause did not apply to state legislators since the clause has significance only when separation of powers is involved and no such problem exists when a state legislator is prosecuted for a federal crime. Id. at 580-81. Nevertheless, emphasizing that state legislators perform extremely important functions, id., the third circuit found it necessary to recognize a federal common-law privilege in order to foreclose the possibility that state legislators would be hindered by a threat of prosecution based on their official conduct, id. at 583. The court ruled, however, that the common-law privilege did not protect any of the evidence sought by the subpoenas. Id. at 585. The court indicated that the same restrictions imposed by the Supreme Court on the constitutional clause, see notes 57-58 and accompanying text supra, also would apply to the common-law privilege. 563 F.2d at 584-85. A concurring opinion disagreed with the majority's discussion of a federal common-law privilege. Id. at 586-88 (Gibbons, J., concurring). At the
Against this divided background, the sixth circuit, in United States v. Gillock, decided the most recent case on point. Defendant Gillock, a Tennessee state senator, was charged with soliciting and accepting a bribe "under color of official right" in exchange for his efforts in an official capacity to prevent an extradition, a violation of the Hobbs Act. During the course of the trial, Gillock filed a motion to suppress all of the evidence bearing upon his activities as a state legislator on the ground that he possessed a common-law speech or debate privilege under Rule 501 of the Federal Rules of Evidence. The motion was granted by the district court.

A divided sixth circuit affirmed, ruling that a common-law speech or debate privilege is available to protect state legislators in federal prosecutions. Noting the frequency with which conflicts over power have arisen between the executive and the legislative branches of government, the Gillock court dismissed the government's contention that the separation of powers into three coequal branches obviates the need for legislative privilege. The court suggested that federal prosecutorial authority could be misused against dissident state legislators as easily as against Congressmen. Since this would have a detrimental effect on legislative independence,

outset, Judge Gibbons emphasized that the determination that the subpoenaed records did not fall within the ambit of "legislative acts or speech" was sufficient to obviate further consideration of the issue of the existence of a privilege. Id. at 586 (Gibbons, J., concurring). Judge Gibbons also was disturbed by the majority's failure to define adequately the scope of the privilege recognized. Id. at 586-87 (Gibbons, J., concurring). He criticized the endorsement of the privilege on the basis that its supposed beneficial aspect, the increased freedom of expression in the legislature, was far outweighed by its detrimental effect on federal law enforcement. Id. at 587 (Gibbons, J., concurring). Insofar as the claimed privilege was not necessary to protect confidentiality and since a similar privilege had not been recognized to protect the state judiciary, the concurring judge felt that the endorsement of a common-law speech or debate privilege for state legislators was unwarranted. Id. at 588 (Gibbons, J., concurring).

5 Id. at 286; see 18 U.S.C. § 1951 (1976).
55 587 F.2d at 286; see note 13 supra.
57 587 F.2d at 286.
58 Id. at 290.
6 Id. at 286. Rather than contending that there is no separation of powers controversy where the action involves the federal prosecution of a state official, see Craig, 528 F.2d at 783 (Tone, J., concurring), the prosecution in Gillock claimed that the separation of powers completely eliminates the need for the privilege. This argument appears to be diametrically opposed to the well-established proposition that one of the essential functions of the speech or debate clause is to preserve the constitutional delineation of powers. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975); Doe v. McMillan, 412 U.S. 306, 311 (1973); Gravel v. United States, 408 U.S. 606, 616 (1972); United States v. Brewster, 408 U.S. 501, 508 (1972); United States v. Johnson, 383 U.S. 169, 182 (1966).
63 587 F.2d at 286; see notes 129-30 and accompanying text infra.
the court found it necessary to adopt a federal common-law privilege.\textsuperscript{91}

In a vigorous dissent, Judge Weick criticized the recognition of a common-law speech or debate privilege as contrary to the weight of prior circuit court authority and detrimental to the judicial process of ascertaining the truth.\textsuperscript{92} Contending that the justification for the privilege exists only where the conflict is between coordinate branches of a single government,\textsuperscript{93} Judge Weick stated that, since there is no separation of powers controversy between a state legislator and the federal government, “a federal common law speech or debate privilege cannot logically exist.”\textsuperscript{94} The dissent also noted that the sole protection enjoyed by a state legislator in a federal cause of action is the doctrine of official immunity.\textsuperscript{95} Since the doctrine provides no immunity from liability in a criminal case, he continued, neither should there exist an evidentiary privilege.\textsuperscript{96} Finding no history of abuse in this country that warranted the creation of a common-law speech or debate privilege,\textsuperscript{97} Judge Weick

\textsuperscript{91} 587 F.2d at 290. Although affirming the lower court on the existence of a privilege, the sixth circuit held that certain evidence suppressed by the district court did not fall within the scope of the privilege and hence modified the decision accordingly. \textit{Id.} at 294. The \textit{Gillock} majority measured the extent of the protection afforded by the common-law privilege in accordance with the views of the Supreme Court concerning the scope of the constitutional speech or debate clause. \textit{Id.} at 292-94 (quoting \textit{Gravel v. United States}, 408 U.S. 606, 625-26 (1972); \textit{United States v. Brewster}, 408 U.S. 501, 512-13, 515-16 & n.10 (1972); \textit{United States v. Johnson}, 383 U.S. 169, 172, 185 (1966)).

\textsuperscript{92} 587 F.2d at 294-96 (Weick, J., dissenting).

\textsuperscript{93} \textit{Id.} at 296-97 (Weick, J., dissenting).

\textsuperscript{94} \textit{Id.} at 297 (Weick, J., dissenting). According to the dissent, an indication that a common-law privilege should not be recognized is discernible from the Supreme Court’s disparate treatment of attempts to obtain injunctions against federal and state legislators. \textit{Id.} Judge Weick noted that, while injunctive relief is precluded by the speech or debate clause when the defendant is a member of Congress, see \textit{Powell v. McCormack}, 395 U.S. 486 (1969), the activity of a state legislator has been enjoined without discussion of the speech or debate privilege on analogous facts, see \textit{Bond v. Floyd}, 385 U.S. 116 (1966). See also \textit{Jordan v. Hutcheson}, 323 F.2d 597 (4th Cir. 1963); \textit{Bush v. Orleans Parish School Bd.}, 191 F. Supp. 871 (E.D. La.), \textit{aff’d per curiam sub nom. Denny v. Bush}, 367 U.S. 908 (1961). It is submitted, however, that this argument presumes either that the defendants in \textit{Bond} raised the issue of speech or debate privilege, or that in the absence of the assertion of the privilege the Court considered this defense sua sponte. Neither presumption is tenable. The district court opinion in \textit{Bond}, 251 F. Supp. 333 (N.D. Ga. 1966), from which an immediate appeal was taken to the Supreme Court, does not indicate that the defendants raised the issue of the applicability of the speech or debate protection. Neither the lower court nor the Supreme Court mentioned a privilege. Consequently, it is submitted that the success of the plaintiff in \textit{Bond} is not indicative of the Court’s disposition of the issue whether a common-law privilege exists.

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.}
stated that the existence of procedural safeguards in criminal prosecutions sufficiently minimizes the possibility that the federal government could infringe upon the independence of state legislators.\textsuperscript{98} It also was maintained that, since the federal government is empowered to prosecute state legislators for violations of federal law, the refusal to recognize the purported common-law privilege would not substantially increase federal power over state legislators.\textsuperscript{99} Judge Weick concluded that no federal common-law immunity should be acknowledged because it would allow “state legislators to avoid with impunity federal criminal liability for their official acts.”\textsuperscript{100}

**The Case in Favor of the Common Law Privilege**

*The Competing Privileges: Speech or Debate and Official Immunity*

Those who oppose the recognition of a common-law speech or debate privilege maintain that, under *Tenney v. Brandhove*, the only protection available to a state legislator in a federal criminal action is afforded by the common-law doctrine of official immunity.\textsuperscript{101} Specifically, they contend that the evidentiary privilege depends upon the existence of an underlying immunity, and since there is no official immunity from criminal liability, no evidentiary privilege can exist in a criminal case.\textsuperscript{102}

Initially, it is submitted that the narrow holding in *Tenney* should not be read to bar every protection but “official immunity.” *Tenney*, which arguably was not a speech or debate case,\textsuperscript{103} merely

\textsuperscript{98} Id. But see note 132 infra.
\textsuperscript{99} 587 F.2d at 299 (Weick, J., dissenting). Judge Weick maintained that, owing to the numerous policy questions, recognition of a common-law speech or debate privilege would raise, id.; see *In re Grand Jury Proceedings*, 563 F.2d 577, 586-87 (3d Cir. 1977), the wiser approach would be to let Congress decide the issue, 587 F.2d at 299 (Weick, J., dissenting).
\textsuperscript{100} 587 F.2d at 299 (Weick, J., dissenting).
\textsuperscript{101} *Gillock*, 587 F.2d at 297-98 (Weick, J., dissenting); *DiCarlo*, 565 F.2d at 896; *In re Grand Jury Proceedings*, 563 F.2d at 587 (Gibbons, J., concurring); *Craig*, 528 F.2d at 782 (Tone, J., concurring). Two commentators have criticized the conclusion that *Tenney* limits a state legislator's protection in federal court to the official immunity doctrine, which can be invoked only in civil actions. See Comment, 8 Rut.-Cam. L.J. 550, 553 (1977); Comment, 45 U. Cin. L. Rev. 325, 329 (1976). It also has been suggested that the failure of the *Tenney* Court to mention prior official immunity cases in its discussion, forecloses the presumption that the basis of the privilege conferred by the Court was the doctrine of official immunity. See Comment, 8 Rut.-Cam. L.J. 550, 553 (1977). It is submitted, however, that since *Tenney* was a civil case, the narrowness of the holding makes it difficult to reject categorically the conclusion that the basis of the privilege conferred in *Tenney* was the doctrine of official immunity. Whether *Tenney* is categorized as an official immunity case does not prevent the recognition of a common-law speech or debate privilege. See notes 107-08 and accompanying text infra.
\textsuperscript{102} See cases cited at note 104 supra.
\textsuperscript{103} United States v. Brewster, 408 U.S. 501, 516 n.10 (1972).
stands for the proposition that Congress did not abolish the traditional insulation of legislators from civil liability in adopting the Civil Rights Acts.\textsuperscript{104} Tenney did not hold, nor has the Supreme Court ever indicated, that the extent of a state legislator’s protection from federal liability is limited to the civil immunity afforded by the official immunity doctrine.\textsuperscript{105} Moreover, the argument that the existence of an evidentiary privilege is foreclosed because the doctrine of official immunity furnishes no protection in criminal prosecutions\textsuperscript{106} ignores the subtle distinctions between the two concepts. The principle of official immunity exempts government officers from any civil liability arising out of the performance of their official duties.\textsuperscript{107} As a result of this immunity, no evidentiary privilege need be extended to the protected official because no civil action may be brought against him for conduct within the scope of his authority.\textsuperscript{108} On the other hand, the common-law and constitutional speech or debate privilege is evidentiary in nature.\textsuperscript{109} In its application, the privilege prohibits a legislative act from being the subject of inquiry outside the legislative chamber.\textsuperscript{110} Nevertheless, the legislator still may be prosecuted for an underlying criminal offense,

\textsuperscript{104} 341 U.S. 367, 376 (1951); see Wood v. Strickland, 420 U.S. 308, 316 (1975); Craig, 528 F.2d at 782 (Tone, J., concurring).

\textsuperscript{105} In United States v. Johnson, 383 U.S. 169 (1966), the Supreme Court stated: “‘[T]he [Tenney] Court . . . viewed the state legislative privilege as being on a parity with the similar federal privilege . . . .’” Id. at 180. Despite this arguably significant interpretation of Tenney, only the first circuit in DiCarlo has taken note of it but the Court stated that “it [would] be reading too much into the [Johnson] Court’s language . . . to say it meant that the state privilege is on a full parity with that of Congress.” 565 F.2d at 806 n.5.

In his concurring opinion in Craig, Judge Tone stated that recent Supreme Court pronouncements “have made it clear” that a state legislator’s protection is limited to the doctrine of official immunity. 528 F.2d at 782 (Tone, J., concurring). Although the cases cited by the concurring Judge may indicate that the legislator in Tenney was protected by the doctrine of official immunity, none specify that Tenney limited a state legislator’s protection to official immunity. For example, in Wood v. Strickland, 420 U.S. 308 (1975), the Court stated that Tenney held “that there was no basis for believing that Congress intended to eliminate the traditional immunity of legislators from civil liability . . . .” Id. at 316; accord, Scheuer v. Rhodes, 416 U.S. 222, 243-44 (1974) (quoting Tenney v. Brandhove, 341 U.S. 367, 379 (1951); Doe v. McMillan, 412 U.S. 306, 320 (1973); Fierson v. Ray, 386 U.S. 547, 554 (1967)). Thus, the Supreme Court’s recognition of a common-law speech or debate privilege would not be inconsistent with prior authority.

\textsuperscript{106} Gillock, 587 F.2d at 298 (Weick, J., dissenting); DiCarlo, 565 F.2d at 807; Craig, 528 F.2d at 782-83 (Tone, J., concurring).

\textsuperscript{107} See notes 9-11 and accompanying text supra.


\textsuperscript{109} See note 5 and accompanying text supra.

provided the prosecution does not call into question his legislative conduct.\textsuperscript{111} Indeed, the Supreme Court frequently has noted that the speech or debate clause of the United States Constitution furnishes a privilege against evidentiary use, even in the absence of a substantive immunity.\textsuperscript{112} Similarly, it would seem that the recognition of a common-law speech or debate privilege does not depend on the existence of an underlying immunity.

\textit{Defining the Purpose of the Speech or Debate Privilege}

It has been suggested that the purpose of the speech or debate privilege is not merely to secure legislative independence, but, more importantly, to preserve the separation of powers among coequal branches of a single government.\textsuperscript{113} The proponents of this view claim that, since there are no balance of power problems when a state legislator is prosecuted by the federal executive, there is no justification for creating a common-law speech or debate privilege.\textsuperscript{114} It is submitted, however, that this argument misinterprets the historical background and the Supreme Court's construction of the speech or debate clause of the United States Constitution.

The Supreme Court apparently has accorded equal weight to both legislative independence and maintaining the separation of powers as justifications for the constitutional speech or debate privilege.\textsuperscript{115} As noted by the Court in \textit{United States v. Brewster}: "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of government."\textsuperscript{116} Admittedly, separation of powers among the branches of the federal government was an important factor in the adoption of the constitutional clause.\textsuperscript{117} Yet, notwithstanding the

\begin{footnotesize}
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\item See Gillock, 587 F.2d at 297 (Weick, J., dissenting) (quoting Gravel v. United States, 408 U.S. 606, 616, 617 (1972)); Craig, 528 F.2d at 783 (Tone, J., concurring) (quoting Gravel v. United States, 408 U.S. 606, 616, 617 (1972)).
\item See Gillock, 587 F.2d at 297 (Weick, J., dissenting); Craig, 528 F.2d at 783 (Tone, J., concurring).
\item The Johnson Court stated that the privilege originated "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." 383 U.S. at 181.
\end{itemize}
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absence of the question in a federal prosecution of a state legislator, the independence and integrity of the state legislature and its members are fundamentally at issue.¹¹⁸

Freedom of legislative speech and debate was considered so indispensable to the effective functioning of the law-making branch that, not only was it incorporated into the United States Constitution, but it also has been guaranteed by the overwhelming majority of state constitutions.¹¹⁹ Thus, a basic tenet of American government would seem to be that all legislators are able to speak and act without fear of criminal or civil litigation.¹²⁰ While most legislators are insulated from state prosecutorial intimidation by state constitutional privileges,¹²¹ they have no similar protection concerning federal criminal charges without a federal common-law speech or debate privilege.¹²² Through its power to initiate and prosecute criminal proceedings, the federal executive has the unique and formidable capacity to harass and intimidate critical state legislators.¹²³ Consequently, the failure to recognize a common-law speech or debate privilege may seriously jeopardize the effective functioning of state legislatures by subjecting the legislators to the threat of federal prosecutorial authority.¹²⁴ It is submitted that this potential for misuse of federal executive power against state legislators would emasculate the protection of the state privilege provisions.¹²⁵ Indeed, there is historical support²⁶ for the Gillock majority’s observation

¹¹⁸ See In re Grand Jury Proceedings, 563 F.2d 577, 579 (3d Cir. 1977). In Craig, the Government conceded that failure to recognize the common-law privilege “would have an inhibiting effect on the [state legislator’s] conduct.” 528 F.2d at 778.

¹¹⁹ Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951); see note 7 supra.

¹²⁰ Tenney v. Brandhove, 341 U.S. 367, 375 (1951); see note 129 infra.

¹²¹ See note 7 and accompanying text supra.

¹²² See notes 12-13 and accompanying text supra.


¹²⁵ As the majority in the Craig panel decision noted, “[t]he evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference.” 528 F.2d at 778.

The argument that the common-law privilege need not be recognized because the powers of the federal executive and judiciary could only be brought to bear on state legislators when a federal criminal violation is involved mistakes the wide range of criminal activity covered by federal statutes such as the Hobbs Act, 18 U.S.C. § 1951 (1976), under which defendants Gillock, Craig, and DiCarlo were indicted.

¹²⁶ 587 F.2d at 286. A recent example of executive abuse of power is the list of “White House enemies” maintained by former President Nixon. See N.Y. Times, June 28, 1973, at 1, col. 5. The admitted policy for keeping the list was to “use the available federal machinery to [retaliate against] our political enemies.” Id. Two suggested means were litigation and prosecution. See 25 Nat’l Rev. 858 (1973). History also shows that the fear of trial before a
that "[i]t is easy to conceive of the abuse of federal prosecutorial power against members of state legislatures of an opposite political persuasion." Moreover, to conclude that the privilege only has relevance where there is a separation of powers conflict appears to ignore the clause's relevance where the action is in the nature of a private civil suit. It is contended, therefore, that the absence of a separation of powers conflict in federal prosecutions of state legislators neither forecloses the existence of nor eliminates the need for a federal common-law speech or debate privilege.

A Common-Law Speech or Debate Privilege in a Federal System of Government

As the Supreme Court has noted, it is imperative that the speech or debate privilege be interpreted in light of the American federal system of government. By virtue of our federalism, the


127 587 F.2d at 286. The absence of a history of abuse of federal prosecutorial power against state legislators does not justify failing to recognize a common-law speech or debate privilege. The Brewster Court stated: "It does not undermine the validity of the Framers' concern for the independence of the Legislative Branch to acknowledge that our history does not reflect a catalogue of abuses at the hands of the Executive that gave rise to the privilege in England." United States v. Brewster, 408 U.S. 501, 508 (1972); accord, United States v. Johnson, 383 U.S. 169, 182 (1966).

128 The Supreme Court has noted that a private civil suit operates "to delay and disrupt the legislative function." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975). Consequently, the Court has not suggested that the purposes served by the clause are significant only where the action has overtones of a separation of powers controversy. Id. at 502. Rather, in a private civil suit the Court stated that the clause exists to protect the legislator from the burden of having to defend himself. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). It is submitted that the Dombrowski Court was more concerned with relieving legislators from this burden than securing the separation of powers since the potential for judicial intimidation is minimal. Indeed, as the Gravel Court noted: "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." Gravel v. United States, 408 U.S. 606, 616 (1972) (emphasis added).

129 Neither the first amendment rights nor procedural safeguards available to all criminal defendants should obviate the need to recognize a federal common-law speech or debate privilege. It is not only the fear of the consequences of the litigation that may inhibit a legislator from functioning effectively, but also the stigma that accompanies criminal charges and the attendant burden of preparing and presenting a defense. See generally Eastland v. United States Servicemen's Fund, 421 U.S. 491, 513 (1975) (Marshall, J., concurring).

states possess sovereign powers in areas not within the exclusive domain of Congress. Thus, the federal government cannot be deemed supreme nor more important than the state governments in all respects. It is submitted, therefore, that the same policy considerations proffered to justify the existence of the constitutional speech or debate clause similarly warrant the acknowledgement of a common-law privilege to protect state legislators. Although the privilege increases the possibility that state legislators will violate federal criminal law with impunity, this risk always has existed as an unfortunate incident to legislative privilege but did not deter the Framers of the Constitution from adopting the privilege. It was a

the American system, see note 131 infra, in that legislative power in its entirety is vested in the Parliament. A Dicey, supra, at 39-40.

131 See U.S. Const. amend. X; Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 371, 376 (1976). The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Thus, state legislatures may exercise lawmaking power not by virtue of a delegation of federal legislative power but as a function of state sovereignty. Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819); Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798); see National League of Cities v. Usery, 426 U.S. 833, 846 (1976).

132 See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819). The principle that state governments perform a function equal in importance to that performed by the federal government was recognized by Thomas Jefferson. In a letter to William Johnson he wrote, "I believe the States can best govern our home concerns, and the general government our foreign ones." Letter from Thomas Jefferson to William Johnson (June 12, 1823), reprinted in 10 P. Ford, The Writings of Thomas Jefferson 232 (1899).

It is submitted that federal prosecutorial and judicial incursions into state legislative domain would violate the vital consideration of federal-state comity. This concept, recently discussed by the Supreme Court in Younger v. Harris, 401 U.S. 37, 44 (1971), connotes "a proper respect for state functions" and requires that, in endeavoring to preserve and protect federal rights, the national government should attempt "to do so in ways that will not unduly interfere with the legitimate activities of the States." Id.

It is submitted that the DiCarlo Court misconstrued the import of the concept of comity when it concluded that the relationship between the federal and state governments did not supersede the federal prosecutor's need for evidence. 565 F.2d at 806 (citations omitted). As the Supreme Court established in Younger, it is the state's interest, in this case preserving the integrity and independence of the legislature, see United States v. Brewster, 408 U.S. 501, 507 (1972), and not merely the federal-state relationship, that must be weighed against the corresponding interest of the federal government. See Younger v. Harris, 401 U.S. 37, 44 (1971). It appears that a common-law speech or debate privilege is needed to ensure that the States can "function effectively in a federal system," National League of Cities v. Usery, 426 U.S. 833, 843 (1976), and to guarantee a proper respect for state sovereignty.

133 At least one scholar has stated that a common-law protection for legislators "exists independent[ly] of [a constitutional] declaration as a necessary principle in free government. . . . " T. Cooley, Torts § 119, at 229 (stud. ed. 1907); see Note, "They Shall Not Be Questioned. . . .", 3 Stan. L. Rev. 486, 493 (1951).

134 The Brewster Court noted that the constitutional clause has "enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers." 408 U.S. at 516.
conscious determination that it would be better to tolerate the abuses than to compromise the essential integrity of the law-making body by exposing legislators to the threat of civil or criminal liability. Furthermore, the Supreme Court's recent constriction of the scope of the constitutional privilege to that which is absolutely necessary to preserve legislative independence reduces the potential for misuse. The extent of the common-law privilege presumably would be equally circumscribed.

Additionally, the speech or debate clause of the Constitution does not completely exempt legislative activity from review, but dictates that "for any Speech or Debate . . . [congressmen] shall not be questioned in any other Place." Hence, the speech or debate clause merely limits the locus of the reviewing forum to the legislature itself. Despite the criticisms of the legislature as not being a suitable tribunal for the criminal trial of its members, whatever problems exist conceivably could be overcome. The formulation of a federal common-law speech or debate privilege for state legislators hopefully will encourage state legislatures to develop efficient procedures to deal with the criminal conduct of members. Even if this does not occur, it should not militate against recognizing a common-law privilege, since misuse historically has been viewed as the necessary cost of realizing the vital benefits of the speech or debate privilege.

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136 See notes 57-58 and accompanying text supra.
137 U.S. CONST. art. I, § 6, cl. 1 (emphasis added).
139 United States v. Brewster, 408 U.S. 501 (1972). The Brewster Court stated that "Congress is ill-equipped to investigate, try and punish its Members." Id. at 518. See generally Note, The Bribed Congressman's Immunity From Prosecution, 75 YALE L.J. 335, 348-49 (1965).
140 Cella, supra note 2, at 41.
141 In his dissenting opinion in United States v. Brewster, 408 U.S. 501 (1972), Justice White suggested that the Houses of Congress "develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process." Id. at 563 (White, J., dissenting); accord, Cella, supra note 40, at 1088.
142 See Cella, supra note 2, at 40.
CONCLUSION

The doctrine of legislative privilege of speech or debate has developed in large part to compensate for the unique susceptibility of the legislature to intimidation by the executive and judiciary. Despite the potential for abuse, the privilege has been recognized as essential to the effective operation of representative government, insofar as it preserves the independence and the integrity of the law-making body. Clearly, the recognition of a common-law speech or debate privilege is not precluded by past Supreme Court decisions. Moreover, our federal system, characterized by the apportionment of executive, legislative and judicial functions between a local and a national government, demands the independence of state legislators who perform functions no less vital than those performed by federal legislators. The need to enforce federal criminal law should not compromise this integrity. It is suggested, therefore, that it is incumbent upon the Supreme Court to recognize a federal common-law privilege essentially commensurate in scope with the constitutional speech or debate clause in order to prevent the type of federal intimidation of state legislators that would undermine the independence of the law-making branch of state governments.

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