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Robert J. Palmer

THE CASE FOR A SPEECH OR DEBATE PRIVILEGE FOR STATE LEGISLATORS IN FEDERAL COURTS

INTRODUCTION

The notion of legislative freedom is a fundamental principle in the American system of government. So important is this concept that the framers of the Constitution incorporated the common law privilege of free speech or debate in Article I, Section 6 of the Constitution. The Clause provides that "for any speech or debate in either House, United States Senators and Representatives, shall not be questioned in any other place."[1] Traditionally, the privilege of free speech or debate has not been given much attention by the courts. However, in recent years, the application of the privilege has been the source of much controversy.

Although the Constitutional Clause applies only to federal legislators, most state constitutions have also granted a similar speech or debate privilege to state legislators.[2] A troublesome question arises when a state legislator seeks the application of the state

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1. Article I, § 6, provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. CONST. art. 1, § 6.

2. ALA. CONST. art. IV, § 56; ALAS. CONST. art. II, § 6; ARIZ. CONST. art. IV, (ii), § 7; ARK. CONST. art. V, § 15; COLO. CONST. art. V, § 16; CONN. CONST. art. III, § 15; DEL. CONST. art. II, § 13; GA. CONST. art. III, § iv par. 3; HAWAII CONST. art. III, § 8; IDAHO CONST. art. III, § 7; ILL. CONST. art. IV, § 12; IND. CONST. art. IV, § 8; KAN. CONST. art II, § 22; KY. CONST. § 43; LA. CONST. art. III, § 13; ME. CONST. art. IV (iii), § 8; MD. D.R. 10, art. III, § 18; MASS. Pt. I, art. 21; MICH. CONST. art. IV, § 11; MINN. CONST. art. IV, § 10; MO. CONST. art. III, § 19; MONT. CONST. art. V, § 15; NEB. CONST. art. III, § 26; N.H. CONST. Pt. I, art. 30; N.J. CONST. art. IV, § iv, par. 9; N.M. CONST. art. IV, § 13; N.Y. CONST. art. III, § 11; N.D. CONST. art. I, § 42; OHIO CONST. art. II, § 12; OKLA. CONST. art. V, § 22; ORE. CONST. art. IV, § 9; PA. CONST. art. II, § 15; R.I. CONST. art. IV, § 5; S.D. CONST. art. III, § 11; TENN. CONST. art. II, § 13; TEX. CONST. art. III, § 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. VI, § 17; WIS. CONST. art. IV, § 16; WYO. CONST. art. III, § 16.

Compare IOWA CONST. art. III, § 10; N.C. CONST. art. III, § 17; (right of legislator to protest action of the legislature). *See also* CAL. CONST. art. IV, § 11; IOWA CONST. art. III, § 11; MISS. CONST. art. IV, § 48; NEV. CONST. art. IV, § 11; S.C. CONST. art. III, § 14 (freedom from arrest). Only the Florida Constitution has no provision concerning legislative privilege.

privilege in a federal court.[3] The question of privileges in federal prosecutions, according to Rule 501 of the Federal Rules of Evidence, is to be determined by federal common law.[4] The Supreme Court has yet to decide whether state legislators are entitled to any speech or debate privilege in a federal criminal prosecution.

This note will first examine the common law origins of the Speech or Debate Clause in the English Parliament as a protective measure for members against criminal liability and from interference by the Crown. The bitter struggle for legislative independence will be traced from its beginning through the embodiment of the privilege in the English Bill of Rights, to the assertions of the privilege by the American colonists.

Secondly, the scope of the speech or debate privilege will be viewed through the decisions of the Supreme Court. The scope was broadly defined in the earlier cases, protecting legislators from both criminal and civil liability for any acts within the legislative process.[5] Recent decisions have narrowed this scope considerably by making distinctions between "legislative" and "political" functions.[6] A determination of the scope of the federal speech or debate privilege is helpful in deciding whether the privilege is necessary for the protection of state legislators.

Thirdly, this note examines the Supreme Court's interpretation of *Tenney v. Brandhove*.[7] This case has been viewed as either a

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3. *See* In Re Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977), (state senator resisting production of legislative documents subpoenaed by a grand jury); United States v. Craig, 528 F.2d 773 (7th Cir. 1976), *cert. denied*, 425 U.S. 973 (1977) (state senator seeking to suppress his grand jury testimony as it related to certain crimes allegedly committed by him in the performance of his legislative role).

4. The rule states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress 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. However, in civil actions or proceedings, with respect to an element of claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

5. *See* United States v. Johnson, 383 U.S. 169 (1966); Kilbourn v. Thompson, 103 U.S. 168 (1880).

6. *See* Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972).

7. 341 U.S. 367 (1951).

Speech or Debate Clause case, or an official immunity case.[8] If viewed as an official immunity case, *Tenney* merely reaffirms a judicially created immunity for government officials.[9] This privilege is qualified and protects the officials only from civil liability.[10] On the other hand, if viewed as a Speech or Debate Clause case, *Tenney* becomes the basis for a common law privilege to be applied to state legislators in a federal criminal prosecution. Although the evidence is conflicting, Supreme Court decisions indicate that *Tenney* has been viewed primarily as a Speech or Debate Clause case.

Finally, an alternative solution to the question of a common law speech or debate privilege for state legislators is proposed. The solution balances the interests of both state and federal governments to determine whether the adoption of state law would be less confusing, and more protective of state interests, than the application of Rule 501. As will be explained, the state interest in protecting its legislators from outside interference outweighs any federal interest. Consequently, state law should be applied in federal courts to determine the privileges of state legislators.

HISTORY OF THE PRIVILEGE

The Speech or Debate Clause of the United States Constitution has it origins in the ancient struggles of the English Parliament against the Crown.[11] Originally Parliament was a judicial body whose function was to resolve new points of law.[12] A shift in emphasis by Parliament from judicial to legislative matters originated the bitter feud between it and the monarchy,[13] which later culminated with the Speech or Debate Clause of the English Bill of Rights in 1689.[14]

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8. Official immunity is a doctrine which gives government officials an absolute privilege from civil liability should the activity in question fall within the scope of their authority and if the action undertaken requires the exercise of discretion. *See generally* Doe v. McMillan, 412 U.S. 306 (1973); Barr v. Matteo, 360 U.S. 564 (1959).

9. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Doe v. McMillan, 412 U.S. 306 (1973).

10. *See* Braatelien v. United States, 147 F.2d 888 (8th Cir. 1945); United States v. Manton, 107 F.2d 834 (2d Cir. 1938).

11. *See generally* C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1970) [hereinafter cited as WITTKE]: Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecution in the Courts*, 2 SUFFOLK U.L. REV. 1 (1968) [hereinafter cited as Cella].

12. Cella, *supra* note 11, at 3.

13. *Id.*

14. The clause provides that "the freedom of speech and debate or pro-

This shift in emphasis brought an awareness to Parliament that certain rights and privileges had to be asserted if it was to function effectively as a legislative body. During the reign of Henry VIII these asserted rights and privileges took the form of a petition from the Speaker of the House of Commons to the King.[15] In the petition, the Speaker absolved himself and other members from the consequences of error or the displeasure of the King.[16] Freedom of speech or debate in the House was included in the petition for the first time in 1541.[17] It was obvious to the members of Parliament that their freedom of speech had to be asserted against the King.

The need for the privilege of free speech had been illustrated in *Strode's Case* in 1512.[18] Richard Strode, a member of the House of Commons, introduced a bill in Parliament to regulate certain abuses in the tin mining industry. Strode had some personal interest in the passage of the bill and was brought to trial, in a court of special jurisdiction, for obstructing the mining of tin. The court found Strode guilty and he was fined and imprisoned.[19]

Strode remained imprisoned until a special bill was passed by Parliament. The bill not only annulled the judgment against Strode, but it also asserted:

> [S]uits, accusements, condemnations, executions, fines, punishments, arrests, grievances, charges and impositions, put or had, or hereafter to be had, unto or upon the said Richard, and to every other of the person, or persons afore specified that now be of this present Parliament, or that of any Parliament hereafter shall be, for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament to be communed and treated of, be utterly void and of none effect.[20]

The bill thus granted, at the very least, an absolute freedom of speech for Strode and the other members of the House for Parliamentary matters.

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ceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament." Preamble to Bill of Rights (1689).

15. Cella, *supra* note 11, at 4.
16. WITTKE, *supra* note 11, at 23.
17. Cella, *supra* note 11, at 6.
18. *Id.*
19. *Id.*
20. WITTKE, *supra* note 11, at 25.

The absolute freedom of speech was severely tested in the late 16th century during the reign of Queen Elizabeth.[21] At that time, Parliament was deeply concerned with the question of royal succession, and was discussing the matter during its sessions. Queen Elizabeth was outraged that members of Parliament were concerning themselves in what she believed to be her royal prerogative. In order to stop such invasions by Parliament, the Queen ordered that no further discussions of such matters be allowed. Her order did not stop the discussions, but it did irritate the members of Parliament. In their view it was now the Queen who was invading ancient rights and privileges. In a final effort to end debate on the topic of succession, Elizabeth summoned the Speaker of the House and ordered him to stop the discussions. The Speaker refused to obey the order and the Queen was forced to abandon her attempt to control the discussions of Parliament.[22]

Elizabeth made another attempt to dominate the business of Parliament in 1571.[23] Mr. Strickland, a member of Parliament, was ordered restrained from attending sessions of Parliament. Strickland had introduced a bill in Parliament to reform the Common Prayer Book. The explanation offered by Elizabeth for her action was that Strickland had introduced "a bill into the House against the Prerogative of the Queen."[24] The Queen explained that it was for this reason, and not for any words actually spoken by Strickland in the House, that he was being restrained.

It was during this period that Paul Wentworth made speeches on the importance of the Parliamentary privileges. Inspired by these speeches, the House raised such an uproar with the Queen that Strickland was returned to his seat.[25] For a second time Elizabeth had failed in her attempt to narrow Parliament's privilege of free speech and debate.

The last major attempt by Queen Elizabeth to control the business of Parliament occurred in 1575. A bill had been introduced in the House concerning the rites and ceremonies of the Church. Believing that all religious affairs were the exclusive prerogative of the Queen, Elizabeth banned all discussions on the bill. Peter Wentworth answered this order by delivering a powerful speech on the

21. Cella, *supra* note 11, at 7.
22. *Id.*
23. *Id.*
24. WITTKE, *supra* note 11, at 26.
25. Cella, *supra* note 11, at 7.

privileges of Parliament.[26] The speech was never completed, however, because Wentworth was forcibly silenced and placed into custody.[27]

While in custody, Wentworth was interrogated by a committee appointed by the House of Commons. He refused to answer any questions of a committee acting on behalf of the Queen.[28] Wentworth would only answer the questions if the committee was acting on behalf of the House, because the House was the only body that had any authority over his Parliamentary actions. He was subsequently imprisoned in the Tower for refusing to testify.[29]

Twelve years later Wentworth was again imprisoned in the the Tower. This time he presented the Speaker of the House with a list of questions concerning the freedom of speech for the members of Parliament.[30] Instead of answering the questions, or introducing

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26. In his address to Parliament, Wentworth stated:

> Mr. Speaker, I find written in a little volume these words in effect: Sweet indeed is the name of liberty and the thing itself a value beyond all inestimable treasure. So much the more it behoveth us to take heed lest we, contenting ourselves with the sweetness of the name only, do not lose and forgo the value of the thing. And the greatest value that can come unto this noble realm . . . is the use of it in this House. . . . I was never of Parliament but the last and the last session at both which I saw the liberty of free speech, the which is the only salve to heal all the sores of this Commonwealth, so much and so many ways infringed, and so many abuses offered to this honorable Council . . . that my mind . . . hath not been a little aggrieved. . . . Wherefore, to avoid the like, I do think it expedient to open the commodities that grow to the Prince and whole States by free speech used in this place. . . . I conclude that in this House, which is termed a place for free speech, there is nothing so necessary for the preservation of the Prince and State as free speech, and without it it is a scorn and mockery to call it a Parliament House, for in truth it is none, but a very school of flattery and dissimulations, and so a fit place to serve the Devil and his angels in and not to glorify God and benefit the Commonwealth. . . . Free speech and conscience in this place are granted by a special law, as that without which the Prince and the State cannot be preserved or maintained. It is a great and special part of our duty and office, Mr. Speaker, to maintain freedom of consultation and speech . . . I desire you from the bottom of your hearts to hate all messengers, talecarriers, or any other thing, whatsoever it be, that in any manner of way infringe the liberties to this honorable Council. Yea, hate it or them, I say, as venomous and poison unto our Commonwealth, for they are venomous beasts that do use it.

Cella, *supra* note 11, at 8.

27. *Id.*

28. *Id.* at 9.

29. Wentworth spent more than a month in prison before the Queen pardoned him and he was released. *Id.*

30. *Id.*

them to the members of Parliament, the Speaker turned the questions over to a member of the Privy Council. The Council's incarceration of Wentworth was viewed as a victory for the Queen.

King James I also sought to suppress freedom of speech or debate for members of Parliament through punishment. In 1621 he was enraged with Parliament when it began discussions on his Spanish marriage and the affairs of the Palatinate. In order to end these discussions, James sent an order for Parliament to refrain from discussing "mysteries of the State."[31] James countered the privilege of free speech by declaring that he was "free and able to punish any man's misdemeanors in Parliament as well as during its sitting as after."[32]

In answer to James' implied threats, Parliament formed a committee. The committee drew up a report in which it reasserted the privilege of freedom of speech.[33] Upon receiving the report, James declared that the assertions were "invalid, annulled, void and of no effect."[34] James shortly thereafter dissolved Parliament to avoid any further confrontations.[35]

The confrontation which James avoided arose eight years later under Charles I. Charles prosecuted Sir John Elliot and two other members of Parliament in the Court of the King's Bench for speeches made by them in the House of Commons which the King regarded as dangerous, libelous and seditious.[36] Elliot and the others defended themselves by claiming that the court lacked jurisdiction to judge any speeches which were made during a session of Parliament. It was claimed that only Parliament, the supreme court of the land, had such jurisdiction.[37] The court rejected this argument and imprisoned the three.[38]

The judgment of the court was very unpopular with both members of Parliament and the common people. In 1641 the House of Commons adopted resolutions declaring the entire proceedings against Elliot and the others a direct violation of legislative

31. WITTKE, *supra* note 11, at 28.
32. *Id.*
33. Cella, *supra* note 11, at 10.
34. WITTKE, *supra* note 11, at 29.
35. James gave as one of his major reasons for dissolving Parliament that the House of Commons "either sat silent, or spent the time in disputing of privileges, descanting upon the words and syllables of our Letters and Messages." *Id.*
36. Cella, *supra* note 11, at 11.
37. 3 HOWELL, ST. TR. 296.
38. *Id.* at 306.

privilege.[39] Further action could not be taken until the Civil War had ended.

This further action came in 1667 when Parliament made one of its strongest assertions of the privilege of free speech. The House of Commons declared that Strode's Act of 1521 was a general law and not confined to *Strode's Case*. According to the House, this declaration was nothing more than a reaffirmation of the "ancient and necessary rights and privileges of Parliament."[40] In accordance with this resolution, the House also declared that the judgment against Elliot and the other members of Parliament were illegal breaches of the privilege.[41] It appeared after these declarations that Parliament was on the verge of finally securing a meaningful privilege of freedom of speech and debate.

The end of Parliament's long struggle with the Crown came after the Revolution of 1688 and the privilege became an essential part of the English Bill of Rights of 1689.[42] Although the privilege could not again be denied by the Crown, it was still the duty of the courts to decide how the privilege would be applied in specific circumstances.

An early case in which the court recognized the privilege of free speech or debate was *Ex Parte Wason*.[43] The case centered around members of the House of Lords who were indicted for conspiring to make false and misleading statements to the House. The court, applying the privilege, decided that it was powerless to question the motives or intentions of members for any speech or debate in Parliament.[44] The privilege granted by the English Bill of Rights was thus given effect by the court.

A second important case defining the scope of the legislative privilege was *Stockdale v. Hansard*.[45] The court established certain standards by declaring:

> [W]hatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prej-

39. Cella, *supra* note 11, at 11.

40. 1 HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS: WITH OBSERVATIONS at 86 (1796).

41. WITTKE, *supra* note 11, at 30.

42. *See* note 14 *supra*.

43. 4 Q.B. 573 (1869).

44. *Id.* at 577.

45. 112 Eng. Rep. 1112 (K.B. 1839).

> udice of any other person, or hazzardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker, by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of Justice.[46]

The importance of the privilege evidently was not lost on this court. Neither was it lost on the American Colonists.

Foundations of the Privilege in America

The speech or debate privilege was not as secure in America during the colonial years as it had been in England. The colonists were often confronted with conflicts between their legislative assemblies and the royal governors. There were also many conflicts between the assemblies and Parliament.[47] The members of the assemblies contended that they possessed some judicial and legislative powers. Parliament, on the other hand, maintained that it alone was vested with such powers.[48] In Parliament's view, the assemblies needed no speech or debate privilege because they had no real power.

The colonists gained experience through these conflicts and also through the history of the struggle for the speech or debate privilege in England. Three early state constitutions contained clauses guaranteeing freedom of speech or debate in the state legislatures even before the United States Constitution was written.[49] The primary reason for these clauses was explained by James Wilson.[50] Emphasizing the importance of a legislator's public duty, Wilson wrote:

> 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.[51]

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46. *Id.* at 1156.
47. Cella, *supra* note 11, at 13-14.
48. *Id.*
49. Maryland Declaration of Rights 1776, Constitution of the State of Massachusetts of 1780, and the Constitution of New Hampshire of 1784.
50. James Wilson was a member of the committee that drafted the Speech or Debate Clause for the United States Constitution.
51. II WORKS OF JAMES WILSON at 38 (R. McCloskey ed. 1967).

In addition to the clauses in the state constitutions, a clause very similar to the one in the English Bill of Rights was adopted for the United States Constitution without opposition.[52]

The freedom which the framers of the Constitution sought to protect was abridged in *Matthew Lyon's Case*.[53] Matthew Lyon was an anti-Federalist Congressman from Vermont who was the first man prosecuted under the Sedition Act of 1798.[54] The indictment against Lyon was for publishing two letters critical of the Adams administration. The first letter accused the President of an "unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice." The second letter charged the administration with "stupidity" in its policy towards France.[55] Lyon was brought to trial for these letters just six days after a grand jury had been impanelled to look into the matter. The Speech or Debate Clause was not raised by Lyon in his defense.[56] He was sentenced to four months in prison and was also fined $1,000.[57]

52. William Pinckney proposed that each House be the sole and exclusive judge of the privilege. James Madison proposed that the extent of the privilege be delineated. Neither proposal gained enough support to be accepted. *See* J. BUTZNER, CONSTITUTIONAL CHAFF at 47 (1941).

53. 15 F. Cas. 1183 (D. Vt. 1798).

54. I STAT. 543 (1798).

55. This letter, allegedly from a diplomat in France, read as follows:

> The misunderstanding between the two governments (France and the United States), has become extremely alarming; confidence is completely destroyed, mistrusts, jealousy, and a disposition to a wrong attribution of motives, are so apparent, as to require the utmost caution in every word and action that are to come from your executive. I mean, if your object is to avoid hostilities. Had this truth been understood with you before the recall of Monroe, before the coming and second coming of Pinckney; had it guided the pens that wrote the bullying speech of your president, and stupid answer of your senate, at the opening of congress in November last, I should probably had no occasion to address you this letter.—But when we found him borrowing the language of Edmund Burke, and telling the world that although he should succeed in treating with the French, there was no dependence to be placed on any of their engagements, that their religion and morality were at an end, that they would turn pirates and plunderers, and it would be necessary to be perpetually armed against them, though you were at peace: we wondered that the answer of both houses had not been an order to send him to a mad house. Instead of this the senate have echoed the speech with more servility than George III experienced from either house of parliament.

15 F. Cas. at 1184.

56. Lyon's attorney had been the Chief Justice of Vermont, but he withdrew from the case when he was refused adequate time to prepare a defense. Although Lyon defended himself, he had little knowledge of the procedures of the court. It is likely that Lyon never knew that he may have been protected by the Speech or Debate Clause. *Id.* at 1185.

57. *Id.*

While Lyon was in prison his constituents re-elected him.[58] He was hailed as a hero of the people for speaking his mind and criticizing the President.[59] Lyon's imprisonment so embarrassed the Adams administration "that the cabinet panted for an excuse to liberate him."[60] Lyon was offered a pardon in return for his apology,[61] but he refused and served his entire sentence.[62] Final satisfaction came in 1840 when a bill was passed in both Houses of Congress which voided the judgment against Lyon.[63]

Matthew Lyon's Case illustrates the importance of a legislative privilege to be free from criminal liability. Legislators must be free to represent their constituents without fear of reprisals from anyone outside of the legislature. The Speech or Debate Clause of the Constitution granted free speech or debate to federal legislators. As it had been in England, it was the duty of the American courts to define the scope of the federal privilege.

SCOPE OF THE AMERICAN PRIVILEGE

An examination of the scope of the speech or debate privilege, through past court decisions, demonstrates the considerations which make the Clause indispensable to federal legislators. These considerations, however, must be reviewed to determine whether they also apply to state legislators. If they do apply, state legislators should be granted a common law speech or debate privilege which could be invoked in a federal criminal prosecution.

Although not involving federal legislators, the first American decision to explore the scope of a state speech or debate privilege was *Coffin v. Coffin*.[64] William Coffin asked Bejamin Russell, a Massachusetts legislator, to introduce a bill authorizing the appointment of an additional Notary Public for Nantucket. After the House had considered the bill and had passed on to other matters, Micajah Coffin,[65] another state legislator, asked Russell where he had received his information concerning the bill. When told that it had been from William, Micajah replied, "What, that convict?"[66] referring to an inci-

58. *Id.* at 1190.
59. J. SMITH, FREEDOM'S FETTERS at 241 (1956).
60. 15 F. Cas. at 1189.
61. *Id.* at 1190.
62. *Id.*
63. *Id.* at 1191.
64. 4 Mass. 1 (1880).
65. William Coffin and Micajah Coffin were not related.
66. Russell told Micajah that William had been aquitted, to which Micajah replied, "That does not make him the less guilty." 4 Mass. at 2.

dent in which William had been acquitted for the robbery of the Nantucket Bank. William subsequently brought a suit against Micajah for slander.

Micajah raised the Speech or Debate Clause of the Massachusetts Constitution[67] as a defense to William's slander charge. In the decision of the court, the scope of the clause was extended to encompass any "opinion, speech, debate, vote, written report" and "to every other act resulting from the nature and execution of the office."[68] These actions were protected whether they were proper or improper in regard to the rules of the House. The only restriction was that the House had to be in session.[69]

Subsequently the court ignored its own broad interpretation and ruled very narrowly that Micajah's words were not within the discharge of his official duty.[70] The slanderous remarks were therefore not protected by the privilege.[71] Later decisions, however, were influenced more by the dicta of *Coffin* than by its narrow ruling.

The United States Supreme Court utilized the broad phraseology of *Coffin* in *Kilbourn v. Thompson.*[72] The action in *Kilbourn* was against members of a Congressional committee and the sergeant-at-arms for false imprisonment. The committee subpoenaed Kilbourn to testify in an investigation of an illegal real estate pool. Kilbourn refused to answer any questions or to produce certain articles requested by the committee. The committee members then passed a resolution and ordered Thompson, the sergeant-at-arms, to arrest and imprison Kilbourn for contempt of the House of Representatives. The Supreme Court held that the order to arrest Kilbourn was unconstitutional.[73] In response to the members' defense of the Speech or Debate Clause, it was held that the protection of the Clause should be extended to written reports, resolutions, voting, and "in short to things generally done in a session of the House by one of its members in relation to the business before it."[74] The voting on the resolution to arrest Kilbourn was

67. "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." MASS. Pt. I, art. 21.

68. 4 Mass. at 27.

69. *Id.*

70. *Id.* at 30.

71. *Id.* at 36.

72. 103 U.S. at 168 (1880).

73. *Id.* at 182.

74. *Id.* at 204.

therefore protected by the Speech or Debate Clause and the Court could not fix liability on the committee members.[75]

However Kilbourn was not without relief. The Court also ruled that Thompson, being only an employee of the House, was not protected by the Clause.[76] In following the unconstitutional orders of the committee, Thompson was subject to liability for false imprisonment. The decision left open the question of whether Kilbourn would have had any remedy had a Congressman, and not the sergeant-at-arms, arrested and imprisoned him. The Court concluded that it was "not necessary to decide here that there may not be things done in one House or the other of an extraordinary character for which members who take part in the act may be held legally responsible."[77] The scope of the Speech or Debate Clause thus remained unclear even after the decision in *Kilbourn.*

The next opportunity to clarify the scope of the Clause did not occur until some seventy years later in *Tenney v. Brandhove.*[78] The case concerned the alleged violation of a citizen's civil rights by the California Senate Fact Finding Committee on Un-American Activities. Brandhove had circulated a petition attempting to persuade the California Legislature to deny further appropriations for the committee. Shortly thereafter Brandhove was summoned to testify before the committee. He refused to testify, alleging that the hearing was not held for a legislative purpose but was designed to "intimidate and silence [him] and deter and prevent him from effectively exercising his Constitutional rights of free speech."[79] Brandhove later brought a suit based on 8 U.S.C. Sections 43[80] and 47(3).[81] The

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75. *Id.*
76. *Id.* at 205.
77. *Id.* at 204.
78. 341 U.S. 367 (1951).
79. *Id.* at 371.
80. 8 U.S.C. § 43 is now found at 42 U.S.C. § 1983 (1976). The section provides that:

> *Every person* who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. (emphasis added).

81. 8 U.S.C. § 47(3) is now found at 42 U.S.C. § 1985(c) (1976). The section states:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of

district judge dismissed the action without an opinion,[82] but the Ninth Circuit Court of Appeals reversed, holding that the complaint did state a cause of action against the committee and its members.[83] The Supreme Court granted a *writ of certiorari* because of the important issues raised concerning the rights of individuals and the power of state legislatures.[84]

The Court assumed that the state legislators were protected by a legislative privilege.[85] However, the Court did not discuss the origin of the state legislators' privilege. It is obvious that the Supreme Court could not have invoked the Speech or Debate Clause because it applies only to federal legislators. The state legislators also could not have been protected by a state speech and debate clause because, at the time the case was brought, the California Constitution contained no such clause. Therefore, some form of common law legislative privilege must have been applied.

The main issue in *Tenney*, according to the Court, was not whether a legislative privilege existed but whether Congress had intended to overturn that privilege by the enactment of 8 U.S.C. Sections 43 and 47. The Court retraced the history of the federal Speech or Debate Clause and concluded that Congress could not have meant to overturn a "tradition so well grounded in history and reason."[86] The Court speculated:

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depriving, either directly or indirectly any person or class of persons of the equal protection of the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote from giving his support or advocacy in a legal manner, toward or in favor of the election of any qualified person as an elector for President or Vice-President or as a Member of the Congress of the United States; or to injure any citizen in person or property on account of such support; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators.

Id.

82. 341 U.S. at 371.
83. Brandhove v. Tenney, 183 F.2d 121 (9th Cir. 1950).
84. 340 U.S. 903 (1950).
85. Tenney v. Brandhove, 341 U.S. 367, 378 (1951).
86. *Id.* at 376.

> Let us assume, merely for the moment that Congress has Constitutional powers to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find Congress thought it had exercised the power.[87]

Implicit in this judicial statement is the idea that if Congress could limit the freedom of state legislators at all, it would have to do so through a very narrowly drafted statute. Whatever the origin of the privilege granted to the California state legislators, it was clear that they were protected from civil liability for violation of the broad statutes involved in that case.

The question of civil liability having been settled, the next major problem was the applicability of the federal speech or debate privilege in the criminal context. Although the privilege as it originally existed in England was used primarily to protect members of Parliament from criminal prosecutions, *United States v. Johnson*[88] was the first case in which the Supreme Court was asked to apply the privilege in a criminal prosecution. Johnson, a former United States Congressman from Maryland, was indicted for a violation of the federal conflict of interest rule[89] and for conspiracy to defraud the United States.[90] The government alleged that Johnson received substantial campaign contributions from a loan company as a result of making a speech which was favorable to independent savings and loan associations. The government further alleged that the contributions were also a payment to Johnson for his attempt to persuade the Department of Justice to review pending indictments against a loan company and its officers for mail fraud. These campaign contributions were never reported to the Department of Justice. Congressman Johnson raised the Speech or Debate Clause as a defense to some of these allegations.

No argument was made that the attempt to influence the Department of Justice was protected by the Speech or Debate Clause. It was obvious that this action was in no way related to the functioning of the legislative process.[91] However, in trying to prove the allegations concerning the speech made by Johnson, the government questioned the former congressman as to how much of the

87. *Id.*
88. 383 U.S. 169 (1966).
89. 18 U.S.C. § 281 (repealed 1962).
90. 18 U.S.C. § 371 (1976).
91. 383 U.S. at 172.

speech was written by him; how much was written by his administrative assistant; and how much was written by outsiders representing the loan companies. The government also questioned Johnson's personal knowledge of the factual material included in the speech and his motives for delivering the speech. Johnson claimed that these questions should be barred by the Speech or Debate Clause.

Tracing the history of the Speech or Debate Clause, the Supreme Court concluded that "[t]he legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature."[92] This privilege was to include not only legislative acts, but also the motives for those acts.[93] The case was remanded to the district court to allow the government to pursue the conspiracy charge without questioning the motive of Congressman Johnson for making the speech, nor the manner in which the speech was prepared.[94] This interpretation of the Clause was the most liberal yet to be expounded by the Court.

In more recent years, however, the liberal construction of the Clause has been considerably narrowed by the Court. In *United States v. Brewster*,[95] for example, the Court held the privilege to be inapplicable even though the facts of the case were very similar to those in *Johnson*. Congressman Brewster was indicted for accepting a bribe.[96] The majority ruled that the crime charged in *Brewster* was complete when the Congressman actually accepted the money in exchange for his promise to act in a certain manner.[97] The actual performance, according to the decision, need not be shown. No inquiry into any legislative act or motivation for any legislative act was necessary to establish the crime.

The majority drew a distinction between legislative acts and political acts. Political acts were, in effect, errands for constituents and were outside the protection of the Clause. These acts included

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92. *Id.* at 179.

93. *Id.* at 183-84.

94. *Id.* at 186. On remand, the district court dismissed the conspiracy count without objection from the government. Johnson was found guilty on the remaining counts. The decision was affirmed in the Circuit Court. *See* United States v. Johnson, 419 F.2d 56 (4th Cir.), *cert. denied*, 397 U.S. 1010 (1969).

95. 408 U.S. 501 (1972).

96. This was a violation of 18 U.S.C. § 201(c)(1)-(2) (1976).

97. 408 U.S. at 526.

making appointments to government agencies, assisting constituents in securing government contracts, preparing newsletters for constituents, making press releases, making speeches outside of Congress, and a variety of other acts which have come to be expected by constituents.[98] Such acts were "political" because they were merely casually or incidentally related to legislative affairs and not a part of the legislative process itself.[99]

The Supreme Court elaborated further on the political-legislative distinction in yet another criminal prosecution, *Gravel v. United States.*[100] Senator Gravel convened a meeting of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee. At this meeting he read into the record a large portion of the Pentagon Papers.[101] Gravel then placed the entire forty-seven volumes of the report into the public record. Press reports later revealed that Gravel had also made arrangements for the private publication of the report by Beacon Press.[102] A grand jury was convened to investigate the possible criminal conduct of Senator Gravel in regard to these activities.[103] Subpoenas were served on the publisher of Beacon Press and members of Gravel's staff. Gravel, as an intervenor, made a motion to quash the subpoenas[104] on the ground that they violated the Speech or Debate Clause by compelling his aides to testify to matters pertaining to the preparation of the subcommittee's meeting.[105]

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98. *Id.* at 512.

99. *Id.* On the other hand, legislative acts are those things "generally done in a session of the House by one of its members in relation to the business before it. . . ." *Id.* (cite omitted).

100. 408 U.S. 606 (1972).

101. The report, entitled "History of the United States' Decision-Making Process in Viet Nam Policy," was given a Defense Department security classification of "Top Secret-Sensitive."

102. There was evidence that the publication of the report would not be a profit making venture for Senator Gravel. 408 U.S. at 634.

103. The crimes being investigated were the retention of public property with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371). *Id.* at 608.

104. The Court of Appeals in United States v. Doe, 455 F.2d 753, 756-757 (1st Cir. 1972), held that because the subpoena was directed to third parties who could not be counted on to risk contempt to protect the intervenor's rights, people such as Senator Gravel might be "powerless to avert the mischief of the order" if they were not allowed to appeal the subpoena as an intervenor. *See also* Perlman v. United States, 247 U.S. 7, 13 (1917).

105. The question of whether a Senator's aides could invoke the Speech or Debate Clause had never before been presented to the Court. The Court ruled that

The majority held that matters pertaining to the preparation of the subcommittee's meeting were not legislative acts and were not protected by the Speech or Debate Clause. The only legislative act recognized by the Court was the placement of the report into the public record. Gravel or his aide could therefore be questioned as to the sources of the classified material, as long as the legislative act itself was not brought into question. The Court also ruled that it would allow questioning "as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing."[106] The third party crime in this case was the plan of Beacon Press to publish and distribute the Pentagon Papers.

Senator Gravel contended that the private publication and distribution of the report was within his legislative function and should be protected by the Clause. Gravel maintained that in order to be an effective legislator he must be allowed to inform his constituents of the actions of the executive branch. This flow of information was necessary in order for the constituents to form intelligent opinions and to inform the Senator of those opinions. The informing function was thus an essential element of the legislative functioning. The majority of the Court disagreed with Gravel, holding that such an informing function was merely political and not protected by the Clause.[107] The informing function was viewed as an important element, but not an absolutely necessary ingredient of the legislative process.[108]

The Supreme Court began with a very broad interpretation of legislative privilege, extending its protection to both state and federal legislators in civil suits and to federal legislators in criminal cases. However the Court has consistently narrowed the scope of the privilege in recent years. This has been done primarily by making a distinction between political and legislative activities. Political activities, such as appointments to government agencies and press releases, are merely tangentially related to the job of legislating and

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since the aides were indispensible to the Senator in the performance of his duties, their acts should be privileged to the same extent that the acts would have been privileged had they been performed by the Senator himself. 408 U.S. at 621-22.

106. *Id.* at 629.

107. *Id.* at 625.

108. *Id.* For a discussion on how this ruling might undermine the power of the legislature, *see* Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence.* 59 VA. L. REV. 175 (1973).

are not privileged. On the other hand legislative activities, which include the actual voting on and debating of issues, are protected. These activities are the essential actions of legislators. A question yet to be decided by the Supreme Court is whether these legislative activities, when performed by a state legislator, are privileged in a federal criminal prosecution.

DECISIONS ON A SPEECH OR DEBATE PRIVILEGE FOR STATE LEGISLATORS IN FEDERAL CRIMINAL PROSECUTIONS

United States v. Craig[109] offered the federal courts their first opportunity to determine whether a state legislator is protected by any speech or debate privilege in a federal criminal prosecution. In this case, Illinois state legislators were indicted for violations of the Hobbs Act[110] and the Mail Fraud Act.[111] Defendant Markert was subpoenaed by a grand jury. In his testimony Markert answered all questions put to him without raising the question of legislative privilege.[112]

During the district court trial, Markert moved to suppress his grand jury testimony by raising both the state and federal Speech or

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109. 528 F.2d 773 (1976).

110. 18 U.S.C. § 1951 (a) (1976). The Hobbs Act provides that:
Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

111. 18 U.S.C. § 1341 (1976). The Mail Fraud Act states that:
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

112. 528 F.2d at 774.

Debate Clauses.[113] The district court, accepting Markert's argument only in regard to the state privilege, dismissed the action. On appeal, however, a panel decision of the Seventh Circuit held that the state speech or debate clause could not be applied in a federal criminal prosecution because both Rule 26 of the Federal Rules of Criminal Procedure,[114] and Rule 501 of the Federal Rules of Evidence[115] mandate that the application of privileges in the federal courts are to be determined by the principles of common law in the light of reason and experience.[116] As to the federal speech or debate privilege, the court found that it protected only federal legislators and could not be extended to state legislators. In view of the federal rules however, the court looked to past Supreme Court decisions to find a common law speech or debate privilege that could be applied to state legislators in the federal courts.[117]

The court found such a common law speech or debate privilege in past decisions.[118] The panel, however, went further than the *Tenney* Court in explaining the reason for the privilege. According to the decision, state legislators, when acting within the scope of their powers, perform a vital role in the American system of government.[119] This vital role was anticipated by the framers of the Constitution when they granted the states all powers not enumerated among the powers of the federal government.[120] The court reasoned that, in light of the importance of state legislatures, it is essential that the members be able to discharge their duties free from any undue influence. The United States Attorney General admitted at oral argument that state legislators may be influenced by threats of federal criminal prosecutions.[121] The opinion concluded that the speech or debate privilege was a basic tenet of our system of government and that state legislators should be granted a common

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113. Article 4, Section 12 of the Illinois Constitution provides that: "A member [of the General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house . . . ." ILL. CONST. art. IV, § 12.

114. "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." FED. R. CRIM. P. 26.

115. *See* note 4 *supra*.

116. 528 F.2d at 776.

117. *Id.*

118. *Id.* at 779.

119. *Id.* at 778.

120. The Tenth Amendment to the Constitution states that: "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.

121. 528 F.2d at 778-79.

law privilege applicable in federal courts, in criminal as well as civil proceedings.[122]

In a concurring opinion, Judge Tone reasoned that the *Tenney* decision did not extend a speech or debate privilege to members of state legislatures, but merely reaffirmed the judicially created doctrine of official immunity.[123] Because official immunity only insulates officials from civil liability, the opinion stated that Markert had no privilege protecting him from criminal liability.

Judge Tone viewed the speech or debate privilege as a means to ensure a separation of powers.[124] Under this view, protection from criminal liability is necessary only when there are equal governmental units involved and one branch must be protected from any abuse of power by the other branches. The concurring opinion stated that due to the Supremacy Clause of the Constitution,[125] there was no separation of powers problem between a state legislature and the federal government. Therefore, state legislators need not be protected from a federal criminal prosecution. The ruling of the panel providing for a common law speech or debate privilege for state legislators in federal courts was overturned when Judge Tone's concurring opinion was accepted as the decision of the court when the case was reheard en banc.[126]

The question of a common law speech or debate privilege also arose in the Third Circuit in *In Re Grand Jury Proceedings.*[127] The case concerned a grand jury investigation of a Pennsylvania state senator for criminal conduct.[128] The state senator was subpoenaed and directed to produce documents, some of which were directly

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122. *Id.* at 779.

123. *Id.* at 782.

124. *Id.* at 783.

125. Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contary notwithstanding.

U.S. CONST. art. VI.

126. 537 F.2d 957 (7th Cir. 1976). To avoid confusion, Judge Tone's decision will be referred to as the "concurring opinion" in 528 F.2d 773, throughout the remainder of this note.

127. 563 F.2d 577 (3d Cir. 1977).

128. The grand jury was investigating allegations of mail fraud, racketeering and tax evasion. *Id.* at 579.

related to his legislative functions.[129] The senator resisted the production of these materials by invoking the Speech or Debate Clause of both the United States and Pennsylvania Constitutions.[130]

The district court held that the clauses were not applicable to a state legislator in a federal criminal prosecution. However, the court did decide that there was a common law speech or debate privilege that could be invoked.[131] On the court's suggestion, the government amended its list of subpoenaed documents.[132] On appeal the Third Circuit affirmed this decision. However, the court in *In Re Grand Jury Proceedings* did not base its decision on *Tenney* as did the panel decision in *Craig*. In fact the Third Circuit agreed with the concurring opinion in that case, saying that *Tenney* merely reaffirmed the doctrine of official immunity as applied to legislative officers.[133] However, the court did base a common law speech or debate privilege on the importance of the role of state legislators and their need

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129. The subpoenaed Senate Majority Appropriations Committee documents included:

(1) The Committee budget for each year, including the breakdown of expenditures.

(2) All audits, formal or informal, performed on the Committee.

(3) All payroll records, including but not limited to, a list by name and address of employees or individuals paid by the Committee for services whether presently working for the Committee or not; cancelled checks, check warrant numbers, time sheets, personnel files, promotion records, service contracts, payroll disbursement journals, personnel applications and correspondence, payroll checking accounts, a list of authorized payroll and bank signatures, all forms filed with federal or state governments on behalf of employees, including income tax, pension and workmen's compensation forms and reconciliation statements.

(4) Expense account records, including but not limited to vouchers, invoices, expense account reports.

(5) all nonpayroll Committee financial records including but not limited to ledgers, ledger cards, journals including cash disbursement journals, invoices, purchase orders, vouchers, contracts, accounts payable, check stub registers, cancelled checks, check warrant numbers, petty cash book, petty cash vouchers, bank statements, duplicate deposit tickets, bank signature cards, balance sheets, financial statements, etc.

(6) All correspondence, memoranda, minutes of Committee, executive or board meetings.

Id.

130. The Pennsylvania constitutional provisions are essentially identical to those in the United States Constitution. *Id.* at 582.

131. 563 F.2d at 580.

132. The major difference in the amended subpoena was that the payroll and financial records of the Senators on the Committee and their staff members who did not work for the Committee were excluded. *Id.* at 582.

133. *Id.* at 581.

to be free from outside interference in the discharge of their legislative duties.[134]

The question of a common law speech or debate privilege for state legislators has been given three distinct answers. The panel decision in *Craig* extended the privilege to state legislators on the strength of federal common law as formed in *Tenney*. When reheard by the Seventh Circuit Court of Appeals sitting en banc, that interpretation of *Tenney* was rejected. The full court, not finding a federal common law speech or debate privilege, refused to shoulder the burden of developing the concept in the federal common law.[135] However, the Third Circuit did accept this burden in *In Re Grand Jury Proceedings*,[136] ruling that regardless of what *Tenney* stood for, the importance of the role of state legislators mandates a common law speech or debate privilege applicable to them in federal courts. A close examination of the concurring opinion in *Craig*, and Supreme Court decisions interpreting *Tenney* reveals that the Supreme Court agreed with the Third Circuit's reasoning and had indeed intended to introduce the common law privilege in *Tenney*.

SUPREME COURT DECISIONS—EVIDENCE OF COMMON LAW PRIVILEGE

Judge Tone's concurring opinion in *Craig* mentions cases in which *Tenney* was cited as reaffirming the notion of official immunity.[137] The opinion also notes cases in which *Tenney* was not discussed where, logically, it could have been cited if the Supreme Court viewed *Tenney* as establishing a common law speech or debate privilege.[138] A close examination of these cases does not reveal convincing evidence that the Supreme Court views *Tenney* as a case applying the doctrine of official immunity to state legislators. Instead, it becomes clear in the Supreme Court's discussions of Speech or Debate Clause cases that *Tenney* is considered one of these cases.

Judge Tone pointed to *Wood v. Strickland*[139] as an example of an official immunity case which cited *Tenney*. In that case the Court had to determine whether the official immunity traditionally

134. *Id.* at 583.

135. United States v. Craig, 537 F.2d 957, 959 (7th Cir. 1976).

136. 563 F.2d 577 (3d Cir. 1977).

137. These cases include: Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); and Doe v. McMillan, 412 U.S. 306 (1973).

138. These cases are: Bond v. Floyd, 385 U.S. 116 (1966); Jordan v. Hutchenson, 323 F.2d 597 (4th Cir. 1963); Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La. 1961), *aff'd sub nom.*, Denney v. Bush, 367 U.S. 908 (1960).

139. 420 U.S. 308 (1975).

granted to school administrators was applicable under the broad statutory language of 42 U.S.C. Section 1983.[140] The reference to *Tenney* in this case was to support the proposition that no common law immunities were overturned by the general language of Section 1983.[141] Like *Tenney, Wood* was merely a case concerning statutory construction. *Tenney* was used only as an aid in the statutory construction. Nowhere in the decision did the Court imply that both legislative privilege and official immunity were identical.

Judge Tone also cited *Pierson v. Ray*[142] and *Scheuer v. Rhodes*[143] to support his contention that *Tenney* is an official immunity case. However, these cases also concerned the statutory construction of Section 1983. Like *Wood* they merely used *Tenney* as an aid in construing the statute.[144] Judge Tone noted that in *Scheuer, Tenney* was cited in the discussion on official immunity, but was not mentioned in the Court's brief discussion of the Speech or Debate Clause. However, this omission does not imply that the Court did not consider *Tenney* a speech or debate privilege case. The discussion in *Scheuer* was concerned solely with the privilege of federal legislators. Discussion of *Tenney* was naturally omitted because it was not concerned with federal legislators, but dealt only with the liability of state legislators. The evidence is thus not convincing that *Tenney* has been included with these cases as an example of official immunity.

O'Shea v. Littleton[145] was mentioned in the concurring opinion of *Craig* to support the idea that state legislators are not protected by any speech or debate privilege. The Supreme Court was quoted

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140. 42 U.S.C. § 1983 (1976), provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. *See* notes 80 and 81 *supra.*

141. 420 U.S. at 316-17.

142. 386 U.S. 547 (1967).

143. 416 U.S. 232 (1974).

144. 386 U.S. at 554-55; 416 U.S. at 243-44.

145. 414 U.S. 488 (1974). One of the issues in *O'Shea* was whether the doctrine of official immunity would protect a judge who violated the constitutional rights of an individual while in the performance of his judicial duties. The Court ruled that official immunity did not immunize criminal conduct proscribed by an act of Congress. *Id.* at 503.

as stating: "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."[146] It appears that Judge Tone may have mistakenly assumed that the Court was speaking only of the criminal liability of state legislative officers. This assumption would be valid if all actions of federal legislators in their legislative roles were protected by the federal Speech or Debate Clause. If such were the case, the only legislative officers who could be criminally liable for the performance of their duties would be state legislative officers. But this is a mistaken assumption, for the Court has always left open the question of whether a federal legislator may do something so repulsive to the rights of a citizen that the Speech or Debate Clause would not protect him. In *Kilbourn v. Thompson*,[147] the Court decided that "it is not necessary to decide here that there may not be things done in one House or the other of an extraordinary character for which the members who take part in the act may be held legally responsible."[148]

The Court in *Powell v. McCormack*[149] also declined to decide "whether under the Speech or Debate Clause petitioners would be entitled to maintain this action against the members of Congress where no agents participated in the challenged action and no other remedy was available."[150] The passage from *O'Shea*, quoted by Judge Tone, therefore does not appear to limit criminal liability for such actions to state legislators. However, it cannot be contended that federal legislators are not protected by the Speech or Debate Clause simply because they may be subject to criminal prosecution for extraordinary actions.[151] Likewise, the imposition of criminal liability on state legislators for similarly extraordinary actions cannot

146. *Id.* (emphasis added).

147. 103 U.S. 168 (1880).

148. *Id.* at 204.

149. 395 U.S. 486 (1969). The Court ruled that the Speech or Debate Clause protected members of Congress from a suit brought against them by Adam Clayton Powell for his exclusion from the House of Representatives. Although the members were privileged, the Court held that the House of Representatives was without power to exclude any person who had been duly elected by the voters of his district and who was not ineligible to serve under any provision of the Constitution. *Id.* at 521.

150. *Id.* at 506 n.26.

151. The Supreme Court has been able to reach a compromise solution in many cases by fashioning relief in which a legislative employee was held liable for his actions while the legislators who ordered the actions were immune to prosecution because of the Speech or Debate Clause. *See* Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1880).

foreclose the existence of a common law speech or debate privilege applicable to them.

The concurring opinion in *Craig* noted three cases which do not contain any mention of *Tenney* although they were all instances in which the Supreme Court issued injunctions against state legislators.[152] The contention is that if *Tenney* opened the way for a common law speech or debate privilege, such a privilege would have been utilized in these cases. The failure to discuss a speech or debate privilege could have resulted in two ways. First, the cases may have been of the extraordinary kind where the only possible remedy for a serious wrong was such an injunction.[153] Secondly, and far more probable, is the possibility that the state legislators did not raise the privilege for some reason.[154] The Court will not raise the privilege on its own. If the privilege is not seasonably raised by the defendant it will be deemed waived.[155]

Contrary to the cases cited by the concurring opinion to establish that a common law speech or debate privilege was not established by *Tenney*, the Supreme Court decisions concerning the legislative privilege indicate that such a privilege was granted to the state legislators. The decision in *United States v. Johnson*,[156] cited *Tenney* as establishing "the state legislative privilege as being on a parity with the similar federal privilege. . . ."[157] It should be remembered that *Johnson* was the first American case in which the speech or debate privilege was invoked in a criminal context. That *Tenney* was viewed as a speech or debate privilege case was made clear in the *Powell* decision.[158] The Court stated that on four prior occasions it had been called upon to decide what activities were protected by the speech or debate privilege. *Tenney* was mentioned as one of these cases.[159] Furthermore, the *Powell* decision agreed with *Tenney* that "the clause not only provides a defense on the merits

152. *See* note 138 *supra*.

153. If this was the case, the compromise usually available to the Court, *see* note 151 *supra*, could not have been made.

154. The raising of the privilege may indicate to some people that a legislator has something to hide. To avoid this feeling among the voters, a legislator may waive the privilege and allow himself to be tried on the merits of the case, hoping for complete vindication without raising a great amount of suspicion among his constituents.

155. *E.g.*, United States v. Pauldino, 487 F.2d 127 (10th Cir.) *cert. denied*, 415 U.S. 981 (1973); United States v. Mooreman, 358 F.2d 31 (7th Cir.), *cert. denied*, 385 U.S. 866 (1966).

156. 383 U.S. 169 (1966).

157. *Id.* at 180.

158. 395 U.S. 486 (1969).

159. *Id.* at 501.

but also protects a legislator from the burden of defending himself."[160] Additional support for *Tenney* as a speech or debate case can be found in *Dombrowski v. Eastland*.[161] The Court in this case used *Tenney* to show that the privilege is limited to those activities "in the sphere of legitimate legislative activity."[162]

Similar interpretations of *Tenney* have also been made in recent years, despite the narrowing of the Clause by the Supreme Court. The *Gravel* decision cited *Tenney* as extending the privilege to include committee reports and the voting of legislative members.[163] As recently as 1975, in *Eastland v. United States Servicemen's Fund*,[164] the Court grouped *Tenney* with other speech or debate privilege cases.[165] If the words of *Tenney* concerning the speech or debate privilege were intended to be mere dicta, it is highly unlikely that the Court would place such a strong emphasis on those words in later Speech or Debate Clause cases.

Although *Tenney* has been cited in some official immunity cases, it is evident that the Supreme Court has viewed *Tenney* as essentially a speech or debate case. *Tenney* thus may be considered the federal common law link needed to extend a speech or debate privilege to state legislators in federal criminal prosecutions under Rule 501 of the Federal Rules of Evidence. However, this is at best a very tenuous link. In cases where there is no federal common law applicable, or the common law is ambiguous, the federal court must have some other basis for deciding whether a privilege should be granted. When a state has a great interest in the outcome of such a case, the federal court examining state law would be in a better

160. *Id.* at 502-03.

161. 387 U.S. 82 (1967). The defendants in this case were the Chairman and the Counsel of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. The defendants allegedly conspired with state officials to seize property and records belonging to the plaintiffs. The Court affirmed a lower court ruling giving summary judgment to Senator Eastland, based on the Speech or Debate Clause. However, the Court remanded the case with respect to the suits brought against the counsel on the grounds that he was a mere employee of the legislature and not protected by the Clause. *Id.* at 85.

162. *Id.* (cite omitted).

163. 408 U.S. at 625.

164. 421 U.S. 491 (1975). A servicemen's organization brought a suit against the Chairman of the Senate Subcommittee on Internal Security, senators, and chief counsel of the subcommittee to enjoin the enforcement of a subpoena served on a bank ordering it to produce all records involving an account. The Supreme Court reversed the lower court ruling and held that the activities of the subcommittee, the individual senators and the chief counsel fell within the legislative sphere and were protected by the Speech or Debate Clause.

165. *Id.* at 502-03.

position to protect the interests of both the state and federal governments than if it had no such guidelines.

ADOPTION OF STATE LAW AS A SOLUTION

The solution to the problem of whether there should be a federal common law privilege for speech or debate for state legislators should not rest solely upon an interpretation of the *Tenney* decision. That case can be viewed as either establishing such a common law privilege, or alternatively, as reaffirming the doctrine of official immunity. If a court views *Tenney* as establishing a common law speech or debate privilege, the privilege will be applicable in federal courts under Rule 501 of the Federal Rules of Evidence. On the other hand, if a court interprets *Tenney* as reaffirming the doctrine of official immunity, a common law privilege has been neither granted, nor denied, by the Supreme Court. Assuming that the federal common law is silent on the matter, some guidelines need to be established to determine whether a speech or debate privilege should become a part of the common law.

An examination of the origin of Rule 501 of the Federal Rules of Evidence[166] is helpful in establishing the guidelines. The Rules of Decision Act[167] states that "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply."[168] In *United States v. Reid*[169] the Supreme Court interpreted the statute as requiring the federal courts, in criminal cases, to apply the law of the state in which the trial was held as that law existed in 1789. If the state had been admitted to the Union after 1789, the common law as of the date of its admission was controlling.[170] These principles were struck down in two later cases.[171]

166. *See* note 4 *supra.*

167. 28 U.S.C. § 1652 (1976).

168. *Id.*

169. 53 U.S. (12 How.) 361, 363 (1851).

170. *See* Logan v. United States, 144 U.S. 263, 303 (1892).

171. Funk v. United States, 290 U.S. 371 (1933), addressed the question of whether, in a federal court, the wife of a defendant on trial for a criminal offense was a competent witness on behalf of her husband. The Court held that the question should be decided on the basis of common law and that the common law had a "flexibility and capacity for growth and adoption." *Id.* at 383. The Court ruled that the wife was competent to testify on behalf of her husband. *Id.* at 387.

Wolfle v. United States, 291 U.S. 7 (1933), considered whether a written communication between husband and wife was privileged in a criminal prosecution in a federal court. The Court ruled that it was not bound by state rules of privilege, but

The new principle established in these cases was flexible and allowed the federal courts to modify or disregard local laws of privilege "in light of reason and experience."[172]

The *Funk* and *Wolfle* decisions were the foundation of Rule 26 of the Federal Rules of Criminal Procedure.[173] The rule was to be used to determine the admissibility of evidence without a "search [of] common law, statutes and constitutional provisions of the States."[174] The admissibility would be determined by a uniform federal common law and would not be dependent upon diverse state laws.

Federal common law was also made the basis for deciding admissibility of evidence under Rule 501 of the Federal Rules of Evidence.[175] However, before the form of the rule was finally established, it underwent many changes. The Supreme Court Advisory Committee drafted a series of rules in which nine nonconstitutional privileges were enumerated.[176] Only these privileges and those required by the Constitution or an Act of Congress were to be recognized in the federal courts.[177] Congress rejected the Supreme Court draft because it contained "controversial modifications or restrictions upon the common law privileges."[178] In place of the Supreme Court draft, Congress passed the present Rule 501

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was governed by common law principles as "interpreted and applied by the federal courts in the light of reason and experience." *Id.* at 12 (cite omitted). According to the Court, a privilege such as the one involved "suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved." *Id.* at 17. Finding no such necessity in this case, the Court disallowed the privilege. *Id.*

172. 291 U.S. at 12.

173. *See* Advisory Committee Notes to FED. R. CRIM. P. 26.

174. H.R. REP. NO. 2492, 76th Cong., 3d Sess. 2 (1940).

175. *See* note 4 *supra.*

176. The nine enumerated privileges were:
Rule 502: Required Reports
Rule 503: Lawyer-Client Privilege
Rule 504: Physician and Psychotherapist-Patient Privilege
Rule 505: Husband-Wife Privileges
Rule 506: Communications to Clergymen
Rule 507: Political Vote
Rule 508: Trade Secrets
Rule 509: Secrets of State and Other Official Information
Rule 510: Identity of Informers
Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 234-58 (1973).

177. *Id.* at 230.

178. [1974] U.S. CODE CONG. & AD. NEWS 7058.

which in essence provides that "privileges shall continue to be developed by courts of the United States under a uniform standard."[179] The only criteria set for the courts to decide whether a privilege was to become a part of the federal common law are the words "in light of reason and experience."[180] In the case of a common law privilege for state legislators, where federal common law is silent on the privilege, reason and experience may dictate adoption of state law by the federal courts.[181]

There are two prerequisites to a federal court's adoption of state law.[182] First, the source of the law applicable to the litigation must be federal. If the source of the law is federal, the court is not required to apply state law under the *Erie* doctrine[183] or the Rules of Decision Act.[184] Thus, state law, if adopted, would not govern of its own force, but would nevertheless control, having been incorporated in the federal common law.[185] The source of the law is federal in the matter of a legislative privilege in a federal criminal prosecution because the violation of a federal statute is at issue.[186] The first prerequisite to a federal court's adoption of a state speech or debate privilege is therefore met.

The second prerequisite for the possible adoption of state law is that Congress must not have determined the choice of law by dictating the use of either federal or state law. Although Congress had dictated that Rule 501 be applied to determine privileges in federal courts, the rule itself does not foreclose the adoption of state law. The federal court may find the state law desirable "in light of reason and experience" and incorporate it in the federal common law. If so, the second prerequisite is also satisfied.

Once the prerequisites have been satisfied, three criteria have been developed by the courts for determining whether state law

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179. H.R. REP. No. 650, 93d Cong. 2d Sess. 16 (1974).

180. *See* note 4 *supra*.

181. For a discussion on the availability of the adoption of state law in federal courts, *See* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHICAGO L. REV. 823 (1976).

182. *Id.* at 824.

183. Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938). The Erie Doctrine provides that the federal courts cannot declare an independent federal common law in deciding issues which would be governed by state law in state courts. The federal courts must apply state law in the appropriate cases.

184. 28 U.S.C. § 1652 (1976).

185. *See* Board of County Comm'rs v. United States, 308 U.S. 343, 351-52 (1939); Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 599 (1954).

186. *See* Comment, note 181 *supra*, at 825.

should be adopted. These criteria are the need for uniformity of laws throughout the country,[187] the presence of an area of traditionally local concern,[188] and the non-existence of a conflict between state law and federal policies.[189] When these criteria are examined together in the context of a common law privilege for state legislators in federal courts, it is clear that the adoption of state law is a viable alternative.

The first criterion, a need for uniformity in federal laws, is not a barrier to the adoption of state law for a speech or debate privilege. The need for uniformity is usually justified to curtail forum-shopping.[190] Forum shopping, however, is not possible in a case where a state legislator seeks to apply a state speech or debate privilege. The law of the state in which the individual is a legislator would be adopted. Additionally, adoption of state law as the federal common law may, in itself, promote uniformity. Virtually every state has granted a speech or debate privilege to its legislators.[191] The only differences in the state privileges would be in defining the scope of the privilege. These differences could be resolved by applying the scope of the federal privilege as interpreted by the Supreme Court.

The second criterion, presence of a traditionally local concern, is also met in this situation. The denial of the privilege to state legislators could severely disrupt the functioning of a state legislature.[192] Intimidation by outside sources could prevent a legislator from adequately representing his constituents. This would jeopardize the right of the people of a state to be fairly represented in the state legislature. Instead of performing his duties in a way that will best serve his constituents, a legislator may first act in a manner that protects himself from possible prosecution. The views represented in the state legislature would then not necessarily be

187. *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

188. *See* United States v. Standard Oil Co., 332 U.S. 301 (1947).

189. *See* United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580 (1973).

190. H.R. REP. No. 650, 93d Cong., 2d Sess. 16 (1974).

191. *See* note 2 *supra.*

192. *See* United States v. Craig, 528 F.2d 773, 778-79 (1976). The United States Attorney General admitted at oral argument that the failure to recognize a speech or debate privilege for state legislators would have an "inhibiting effect on the conduct of members" of the state legislature. *Id.* at 778. "This threat of the legislature's independence," according to the court, "is fundamentally inconsistent with the idea of legislative action reflected in the policy, purpose and history of the privilege." *Id.* at 778-79.

the views of the people, rather they would be the views of the source of intimidation. Important local matters should not be determined by a legislator who has been intimidated in this manner.[193]

Additionally the punishment of a state legislator for improper conduct in his legislative duties has traditionally been a matter of local concern.[194] Most state legislatures have been granted a right, through state constitutions, similar to the right granted to the federal legislature in Article I, Section 5 of the Constitution,[195] to discipline its members.[196] The vesting of the right to discipline members differs greatly from any right given to the members of the executive or judicial branches. The right to punish members allows a legislative privilege broader than official immunity because, although the legislative acts cannot be questioned in any court, the members can still be held accountable for improper actions by the legislature. The broader privilege is necessary in order for the legislators to exercise their wide discretion in developing laws.

The final criterion is also satisfied because there is no insurmountable conflict between state law and federal policies. Any substantial conflict between the application of a speech or debate privilege and the enforcement of federal statutes may be resolved through a statute which is narrowly drawn to include the prosecution of state legislators.[197] If drafting such a statute is beyond the power of Congress, a new federal rule of evidence could possibly be enacted which would exclude the speech or debate privilege for state legislators in federal courts.[198] The fact that Congress has not

193. The court stated that "[d]eterring a legislator from advancing a point of view, or influencing how he votes by requiring him to explain his motives before a grand jury is precisely the evil the speech or debate privilege intends to prevent." *Id.* at 779. The court based its decision to extend the privilege to state legislators on "the purpose of the speech or debate privilege, its common law history, and the important role of the states in governing the country." *Id.*

194. *See, e.g.*, Wilson v. Cleveland, 157 Mich. 510, 122 N.W. 284 (1909); In Re Speakership of the House of Representatives, 15 Colo. 520, 25 P. 707 (1891); Hiss v. Bartlett, 3 Gray (Mass.) 468 (1855).

195. Article I, § 5 provides that: "Each House may determine the Rules of its proceeding, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5 par. 2.

196. *See e.g.*, ALAS. CONST. art. II, § 12; CAL. CONST. art. IV, § 9; COLO. CONST. art. V, § 12; FLA. CONST. art. III, § 4; HAWAII CONST. art. III, § 13; ILL. CONST. art. IV, § 6; IND. CONST. art. IV, § 15; IOWA CONST. art. III, § 9; KY. CONST. § 39; LA. CONST. art. III, § 7; MICH. CONST. art. IV, § 16.

197. This possibility was left open by the Supreme Court in the *Tenney* decision. 341 U.S. at 376.

198. 28 U.S.C. § 2076 (1976), provides:

The Supreme Court of the United States shall have the power to

chosen to enumerate the privileges applicable in federal courts indicates that Congress views privilege law as still in the developmental stages.[199]

All three criteria for the adoption of state law regarding the speech or debate privilege are met. It follows, therefore, that state law should be adopted "in light of reason and experience." The state law would not in itself be controlling; rather, it would become a part of the federal common law. A common law speech or debate privilege for state legislators could then be applicable in the federal courts under Rule 501.

CONCLUSION

The common law history of the speech or debate privilege indicates that such a privilege is important to protect legislators from intimidation from outside sources. This is especially true when the outside sources are the other branches of the government and the legislator has fears of possible criminal prosecution and convictions for acts done in his legislative role. The importance of the privilege has also been emphasized by Supreme Court decisions which define the scope of the federal privilege. The decisions indicate that a legislator's acts, properly classified as "legislative," are privileged from either civil or criminal liability.

A look at the federal common law as developed in *Tenney* indicates that a common law speech or debate privilege is applicable to state legislators in federal courts, yet this is not conclusive. A resort to the common law interpretations of the *Tenney* decision inadequately protects the interests of the state and federal govern-

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prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress, but no later than the first day of May and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress.

Id..

199. H.R. REP. No. 650, 93d Cong., 2d Sess. 16 (1974).

ments in situations where the common law is unclear. Federal Rule of Evidence 501 provides that the federal common law of privileges can be developed in the light of reason and experience. The question of a common law speech or debate privilege for state legislators in federal courts is one which seems suitable to the adoption of state law "in light of reason and experience." If state law is adopted it becomes a part of the federal common law and applicable to state legislators in federal criminal prosecutions under Rule 501 of the Federal Rules of Evidence.

Robert J. Palmer